Supreme Court, U.S.
FILED
06-247 AUG 14 2006
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.
PETITIONER

vs.

J.P. SCHMIDT, Insurance Commissioner,
Department of Commerce and Consumer Affairs,
State of Hawaii,

and

AIG HAWAII INSURANCE CO.

RESPONDENTS

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did determination by Hawaii Supreme Court that an appeal was frivolous without notice or allowing responses on the question violate Petitioner's federal constitutional rights to due process and equal protection?

2. Did determination of a frivolous appeal by The Hawaii Supreme Court decide an important federal question in a way that conflicts with relevant decisions of this Court or with decisions of several United States Courts of Appeals?

3. Was the unsupported application of issue preclusion by the Hawaii Supreme Court as the basis for its sua sponte determination, extreme or motivated by animus and ill will, and in violation of Petitioner's federal constitutional rights to petition, to advocate, to due process and to equal protection?

4. Was the state supreme court's conduct and decision in favor of Respondent AIG Hawaii Insurance Co. ("AIG") structurally biased, due to the control AIG and other insurers have over the appointment and retention of state judges and justices?

5. Did the state, through its agencies and courts deprive Petitioner, a physician, of his constitutional right to work by *ad hoc* rule-making, biased courts and disparate treatment?

PARTIES TO THE PROCEEDING

All parties appear in the caption of this case, on the cover page.

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a. Order Affirming Commissioner's Final Order Filed October 13, 2003 (unpublished). Appn 13-15.

b. Judgment (unpublished). Appn 11-12.

3. Emerson M.F. Jou, M.D., as Provider For Albert Watanabe, Provider-Appellant-Appellant, **vs.** J. P.

Schmidt Insurance Commissioner, Department Of Commerce and Consumer Affairs, State of Hawaii, Appellee-appellee, and AIG Hawaii Insurance Company, Respondent-Appellee-appellee. **SC 26877**.

a. Summary Disposition Order, filed 5-18-06 (unpublished). Appn 0-6. Concurring and Dissenting Opinion. Appn 6.

b. Order Denying Motion For Reconsideration, filed 6-1306 (unpublished). Appn 46-47.

c. Notice And Judgment on Appeal, filed 6-30-06 (unpublished). Appn 48-52.

d. Order Granting In Part And Denying In Part Requests For Fees And Costs, filed 7-10-06 (unpublished). Appn 7-10.

e. Judgment For Fees And Costs, filed 7-10-06 (unpublished). Appn 53-54.

f. Affirmance, reported at 110 Haw 418, 133 P.3d 1210 (2006). Appn 55.

BASES FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 §1257(a), or Rule 10(b) of the Supreme Court Rules.

The dates that the judgments or orders sought to be reviewed were entered are as follows:

May 18, 2006. Summary Disposition Order. Appn 0-6.

June 13, 2006. Order Denying Motion For Reconsideration. Appn 46-47.

June 30, 2006. Notice And Judgment On Appeal. Appn 48-52.

July 10, 2006. Order Granting In Part And Denying In Part Requests For Fees And Costs. Appn 7-10.

July 10, 2006. Judgment For Fees And Costs. Appn 53-54.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

1st Amendment (Article I)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5th Amendment (Article V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

14th Amendment (Article XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any Sate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES AND RULES INVOLVED

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STATEMENT OF THE CASE

A. Facts Material To Questions Presented

On May 18, 2006, the Hawaii Supreme Court, with one justice dissenting, sua sponte determined Petitioner's appeal over nonpayment of medical bills by AIG was frivolous, without affording an opportunity to respond. **Appn 3-5.** The Court took this action without notice or an opportunity to respond (**Appn 6**) based on one of its earlier cases (**Appn 5**). That case was grounded on federal decisions, and a pre-1994 version of Rule 38, Federal Rules of Appellate Procedure ("FRAP"). **Appn 5 (citing** Abastillas v. Kekona, 87 Haw 446, 449, 958 P.2d 1136 (1998) (omitting federal citations)).

The importance of the 1994 amendment to FRAP 38 is that its letter and spirit prohibited the instant sua sponte determination, applying Federal law, by the Hawaii Supreme Court. The commentary of the amended rule specifically cited Roadway Express Inc. v. Piper, 447 U.S. 752, 767, 100 S.Ct 2455 (1980) as requiring notice and an opportunity to respond before sanctioning a party on appeal.

Frivolousness, in the Hawaii Supreme Court's decision, was based on its determination that Petitioner filed the appeal "despite the lack of any material change in the facts, law, or arguments advanced – only six weeks after the court rejected the same arguments made by Dr. Jou in SC 24[illegible]6, a decision binding against him". **Appn 4.** While there had been numerous material changes in facts, law and arguments advanced, Petitioner was foreclosed from identifying them by the state court's violation of Roadway Express. **Appn 6.**

Petitioner would have succeeded on this record, which the Hawaii Supreme Court had not completely reviewed, a purely ministerial act.

While avoiding facts, law, or arguments of record, the state court nonetheless identified an issue which it thought was precluded: "Dr Jou is precluded from relitigating the issue of whether an insurer is obligated to reimburse a licensed physician/medical provider for physical therapy services provided by third parties not licensed as physicial therapists or physicians but acting under the physician/provider's supervision ..." **Appn 3¶(2).**

This pronouncement left out substantial litigation on this record over AIG's down-coding of medical office visits where an AIG insured was examined and evaluated by Petitioner, a physician. **Appn 81, 128 (defined).** The Hawaii Supreme Court's extreme application of issue preclusion (where it doesn't belong) also avoided facts of record that AIG was refusing to pay, not because physical therapists should have done a certain procedure, but because of "bundling". Bundling has nothing to do with license type or the issues alleged to have preclusive effect.

Other services provided to AIG"s insured by Petitioner, as the record shows, were simply partially paid, without a reason. **Appn 81.** Again, this scheme by AIG has nothing remotely to do with physical therapy being provided by non-physical therapists. **Appn 80, 81.** In re Managed Care Litig, 135 F.Supp.2d 1253, 1256 (S.D.Fla) clearly shows that the foregoing facts had nothing to do with the issue Petitioner was, according to the Court, precluded from litigating; that is,

"'undisclosed automatic 'downcoding' of claims submitted by physicians.' Id. at P.164. 'Downcoding' is an operation whereby 'CPT codes' (a benefit code entered on a reimbursement form by the provider which refers to a particular service) are arbitrarily and without notice changed in a manner designed to reduce payments due to the physicians. Id. At P164. 'Bundling' is another process in which the Defendants arbitrarily reduce payments by combining two or more procedures. Id at P 165.

The Plaintiffs furthermore submit that the Defendants improperly conceal their manipulation of these procedures and fraudulently misrepresent the criteria for coverage determination, treatment decisions, payments and reimbursements ... The Defendants also systematically 'target, coerce, threaten and intimidate providers who objected to Defendants' wrongful practices.' ...Through ... monopolistic power, the Defendants use economic pressure to continue the fraudulent scheme and extort concessions and property rights from the Plaintiffs."

The lack of record support for the Hawaii Supreme Court's disposition, and other discrepancies was arbitrary and irrational. So too was its failure to apply its own case, decided after Petitioner's first appeal, Orthopedics Associates v. HIG ...AIG ...State Farm...Tokio Marine ...etc. 109 Haw 185, 124 P3d 930 (2005). It is no excuse that the justice signing the judgments here (James E. Duffy, Jr) **(Appn 48-54)** had recused himself from Orthopedics Associates along with two other justices. Justice Duffy, was appointed to the court in 2003, and gave up his lucrative law practice

defending insurance companies, for public service. See Catron v. Tokio Marine Mgmt Inc., 90 Haw 407, 978 P.2d 845 (1999). Walton v. State Farm, 55 Haw 326, 518 P.2d 1399 (1974); Christensen v. State Farm, 52 Haw 80, 470 P.2d 520 (1971).

Orthopedics Associates should have ministerially informed Justice Duffy (and the other two justices who did not participate in that case) that a material change in law had indeed taken place between Petitioner's first and second appeals. **Appn 4¶(4)**. While the first case ended in an injunction against Petitioner providing physical therapy services with employees not licensed as physical therapists (**Appn 39**), the second case was about downcoding, and Petitioner was in the Plaintiff's chair. Orthopedics Associates, decided 12-7-05, was clear and controlling where its unanimous panel stated "We further note that nowhere in HRS §431:10C-304 does it authorize the insurers to downcode the billings." Id 109 Hawaii at 196, 124 P3d at 941.

Since AIG was a party in Orthopedics Associates it was not normal for five experienced jurists to overlook this decision. It was irrational and arbitrary for the Hawaii Supreme Court to ignore the fact that AIG had willfully failed and refused to provide notice to its insureds here, and in Orthopedics Associates, that it was not paying the physicians. This is particularly appalling, in that the Orthopedics Associates panel had decided that this failure violated state law in about 30,000 claims. Id 109 Haw at 191, 196, 124 P3d at 936, 941. This decision is binding here, both because AIG was a party to that suit; and, due to *stare decisis.*

Even without the intervening favorable decision by the Hawaii massage board (**Appn 86, 87**), the refusal by

the Hawaii State Supreme Court to apply its own recent law equally to Petitioner, violated his rights to equal protection of the law. Village of Willobrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 1075 (2000).

The lack of record support for the decision (**Appn 3-5**), and the lack of facts drawn therefrom do not support the action by the Hawaii Supreme Court. This demonstrates a conscious disregard of the record, and deliberate avoidance of knowledge.

A purely ministerial examination of the record would have shown the State Supreme Court that, of those excuses for nonpayment by AIG which arguably fell into the issue-precluded category, the facts had changed substantially, in bold contrast to the court's impression. **Appn 4.** The legal effect of those facts, which had changed since the last decision, is the reason AIG did not press preclusion seriously enough to cite to the record (in violation of court rules). **Appn 58, 60 (HRAP 28(b)(7) and (c)).** Had the state court staff conducted a clerical review of the record it would have learned that AIG had waived the issues of collateral estoppel and res judicata. **Appn 81.** These issues are waivable. Hagan v. Utah, 510 U.S. 399, 409, 114 S.Ct 958, 964 (1993). U.S. Fire Ins. Co. v. Natl Gypsum Co., 101 F.3d 813, 817 (2d cir 1996).

The agency record shows that AIG at first objected to reimbursement, saying the services were "outside the scope of the provider's specialty." Later, for the same claimant, AIG changed positions and paid almost the full amount, giving up all objections. **Appn 80, 81.**

In the other case, AIG's 9-9-04 injunction (**Appn 39**) merely decided Petitioner and his employees were

prohibited from: "(1) employing and utilizing massage therapists to perform the work of physical therapists without proper licensure, and (2) to improperly bill Plaintiff AIG Hawaii Insurance Company, Inc. for said services." **Appn 39.**

Nowhere was this injunction mentioned in the administrative order in the present case. The order was drafted for the state agency by Respondent AIG. **Appn 21-29.** Nowhere was the injunction mentioned in the Respondent Commissioner's decision after the order. **Appn 18-20.**

Petitioner appealed the administrative decision at Bench and the injunction separately. On August 24, 2004, the Hawaii Supreme Court affirmed the injunction. **Appn 33-36** (holding "Dr. Jou improperly billed AIG for physical therapy services which were provided by massage therapists employed by him who were not licensed as physical therapists; consequently AIG does not have a duty to compensate Dr. Jou for such unlicensed activity ..." **Appn 35.**

B. Federal Questions Preserved, And This Court has Jurisdiction

1. Appellate Sanctions Based On Issue Preclusion

Since the determination of issue preclusion and frivolousness were made by the Hawaii Supreme Court sua sponte, without an opportunity to respond, the federal questions relating thereto were raised by a motion to reconsider (**Appn 75-76**) and by objections to appellate fees and costs. **Appn 60-71.** These questions were passed on by the state court by denying the

motion for reconsideration and granting certain fees, without comment.

The federal questions were raised timely at the first opportunity. Saunders v. Shaw, 244 U.S. 317, 320, 327 S.Ct. 638 (1917); Brinkerhoff-Fairs Trust Co. v. Hill, 281 U.S. 673, 677, 50 S.Ct. 451 (1930); Great Northern Rwy Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367, 53 S.Ct. 145 (1932) (no need to raise in advance of event); Richards v. Jefferson County, 517 U.S. 793, 797 n.3 116 S.Ct. 1761 (1996) (res judicata raised by state appellate court).

Review is thus preserved of federal questions stemming from violations of the following amendments to the U.S. Constitution: 1st Amdt, Petition/Expression Clauses (**Appn 73, 75, 76**), 5th and 14th Amdt Due Process clauses ((**Appn 66-70**), 14th Amdt Equal Protection Clauses. (**Appn 73, 75, 76**).

2. Issue Of Retaliation For Asserting Protected Rights

In connection with timely raising due process and equal protection issues, Petitioner asserted, as in 1, above, that the State Supreme Court deprived him of fair services of the judiciary, and was involved in an effort to "get", or retaliate against Petitioner (**Appn 69, 75, 76**) by its sua sponte action. These questions were passed on by the state court, as in 1, above.

3. Violations Of Petitioner's Constitutional Right To Work

These federal questions were timely raised to both the trial court (**Appn 140-145, 152-153**) reviewing the agency decision and, on the briefs to the Hawaii

Supreme Court. **Appn 140-145.** The federal questions were not required to be raised to the agency in the first instance because it lacks authority or jurisdiction to decide them. **Appn 152-153.** Reference to agency records arguments where federal issues were raised, is at **Appn 153.**

The Hawaii Supreme Court passed on these questions by not finding them sufficiently raised. **Appn 2-3.**

The State Supreme Court exercised its discretion to disregard federal questions it asserted were not raised below. **Appn 3.** Nevertheless that court proceeded to exercise its discretion to disregard the issues, due to a perceived failure by Petitioner to present discernable argument. **Appn 2, 3.** The federal questions raised in the court of the first instance were thus properly preserved. Whyy, Inc. v. Borough of Glassboro, 393 U.S. 117, 119, 89 S.Ct. 286 (1968); Charleston Federal Savings & Loan Assn v. Alderson, 324 U.S. 182, 185-86, 65 S.Ct 624 (1945).

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS COURT HAS JURISDICITON AND SHOULD REACH THE MERITS

A. The State Supreme Court Rested Its Sanctions Primarily On Federal Grounds

There was no adequate and independent ground to award damages to respondents without a hearing or opportunity to respond. **Appn 4-6.** The main case cited in the Hawaii Supreme Court's sua sponte sanctions

order was Abastillas v. Kekona, 87 Haw 446, 449, 958 P.2d 1136 (1998); which, in turn, relied on a federal case interpreting a federal rule (FRAP 38), Weinstein v. University of Illinois, 811 F.2d 1031, 1098 (7th Cir. 1987). **Appn 5.** Thus, "it fairly appears that the state court rested its decision primarily on federal ground." Michigan v. Long, 463 U.S. 1032, 1042-44, 103 S.Ct. 3469 (1983).

Even Weinstein did not stand for deprivation of notice and an opportunity to respond in the pre-1994 FRAP 38 context. In that case, the panel determined that the lower court had provided ample warning not to relitigate a prior decision. 811 F.2d at 1098.

Had the Hawaii Supreme Court rested its decision on state law it would not have reached the same result. Its own rule provides:

> **"Rule 38. Damages and costs for frivolous appeals.**
>
> If a Hawaii appellate court determines that an appeal decided by it was frivolous, it may, after a separately filed motion or notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee. (Amended December 6, 1999, effective January 1, 2000)." Emphasis added.

The mere possibility that the court might have reached the same conclusion if it had based its decision on purely state law "does not create an adequate and independent state ground that relieves this Court of the

necessity of considering the federal question." United Air Lines v. Mahin, 410 U.S. 623, 630-631 (1973).

Here, the State Supreme Court construed its version of FRAP 38 broadly, relying on Weinstein, supra to dispense with due process guarantees of notice and opportunity to be heard. Abastillas, supra, 87 Haw at 449. This opinion (**Appn 5-6**) rests squarely on federal grounds. The fact that the state court "might have, but did not invoke state law does not foreclose jurisdiction here." Azcchini v. Scripps Howard Broadcasting Co, 433 U.S. 562, 568 97 S.Ct 2849, 2853 (1997); Delaware v. Prouse, 440 U.S. 648, 652, 99 S.Ct. 1391 (1979); California v. Ramos, 463 U.S. 992, 997-98 n.7 103, SCt 3446 (1983).

B. State Grounds For Sua Sponte Sanctions Order Are Inadequate Or Insufficient

By bootstrapping from the 1987 Seventh Circuit decision cited by the Hawaii Supreme Court in Abastillas v. Kekona, supra, 87 Haw at 449, 958 P.2d 1136, to violate due process requirements, the Hawaii Supreme Court also cited Rhoads v. Okamura, 98 Haw. 407, 414, 49 P.3d 373, 380 (2002) (overruled on other grounds in Alford v. C&C, 109 Haw 14, 144 P.3d 809 (2005). **Appn 4**. Had the Hawaii Supreme Court cited to the record, and to the briefs, its decision would show that plausibility issues here do not compare with Rhoads at all. That case involved a tax protester who asserted inter alia that Hawaii is not a state, 98 Haw at 412, 413, 49 P.3d at 378, 379.

The other state case relied on by the Hawaii Supreme Court (**Appn 5**) was similar to the Abastillas

situation where the lower court had, unlike here, already found a lawsuit to be frivolous. Gold v. Harrison, 88 Haw 94, 107, 962 P.2d 353, 366 (1998); Abastillas, 87 Haw at 448. **Appn 5.**

It is "well settled that if the independent state ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction (citations omitted)." Durley v. Mayo, 351 U.S. 277, 281 76 S.Ct 806, 809 (1956).

The only reasonable inference is that the state supreme court lacked a sufficient or substantial state justification not to provide a hearing, or an opportunity to argue plausibility, before the court concluded the appeal was frivolous.

State caselaw did not support the Hawaii Supreme Court's conclusion at all, since no assertion of frivolousness had been raised in the court below. The closest state case was Wong v. Frank, 9 Haw.App.249, 261, 262, 833 P.2d 85, 92 (App 1992), which, in turn, was grounded on the same federal case which undergrids post-1994 FRAP 38, (Roadway Express v. Piper, supra, 447 U.S. at 767) and Chambers v. NASCO, 501 U.S. 32, 49 111 S.Ct 2123, 2135 (1991).

II. STATE COURT OF LAST RESORT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL RIGHTS ON ISSUE OF SANCTIONS ON APPEAL WHICH CONFLICT WITH DECISIONS OF COURTS OF APPEALS

A. Conflict With The Seventh Circuit

As the lone dissent recognized (**Appn 6**), notice and opportunity to respond must precede the imposition of sanctions. Roadway Express Inc. v. Piper, supra, 447 U.S. at 764-768. The Seventh Circuit cases which provided the State Supreme Court with justification to dispense with Roadway Express' notice and an opportunity to respond were based on the prior version of FRAP 38, which had been amended to expressly accommodate Roadway Express, in 1994. Even under the prior version, other cases from the Seventh Circuit make clear that the facts at Bench are not sufficiently egregious to qualify for the State Supreme Court's suspension here of notice and an opportunity to respond.

This was not an extraordinary case, for instance, involving long and generally incomprehensible briefs totally devoid of any colorable merit, as in Ruderer v. Fines, 614 F.2d 1128, 1130, 1132 (7th Cir. 1980). If some, but not all issues may justify an assessment under HRAP 38, this does not present the extraordinary situation justifying the sua sponte damage award imposed here. United States v. Dack, 747 F.2d 1172, 1176 fn. 5 (7th Cir. 1984).

Even if the level of egregiousness had been high enough to decide that the appeal was frivolous without notice and an opportunity to respond before 1994, the Seventh Circuit adheres to the standard that the conclusions justifying sanctions, must be based on the record. Oglesby v. RCA Corp, 752 F.2d 272, 279-80 (7th Cir. 1985). After the 1994 amendment to FRAP 38, litigants notified about sanctions were afforded a chance to demonstrate plausibility. Plausibility of

arguments had been a valid defense to threatened FRAP 38 sanctions even before the 1994 amendment. Heller Financial Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1295 (7th Cir. 1989).

B. Conflict With Federal Circuit

The Hawaii Supreme Court's failure to base its sua sponte conclusion of frivolousness on the briefs and the record also conflicts with the Federal Circuit's decisions. State Industries Inc. v. Morflo Industries, 948 F.2d 1573, 1578 n.2 (Fed Cir. 1991); Biodex Corp. v. Loredan Biomedical Inc., 946 F.2d 850, 863 (Fed Cir. 1991). These cases show direct conflict, with Hawaii's highest court:

> "However, an assertion that an appeal is frivolous is a serious allegation. We conclude that, henceforth, an assertion by an appellee that an appeal is frivolous should be accompanied by citation to the opposing brief and the record below, and clear argument as to why those citations establish the allegedly frivolous nature of the appeal. See Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578-80, 17 U.S.P.Q.(BNA) 1914, 1917-20 (Fed. Cir. 1991).
>
> As we have repeatedly noted, 'an appeal having a small chance for success is not for that reason alone frivolous' and thus deserving of sanctions. Id. At 1578, 17 U.S.P.Q.2d (BNA) at 1918 (citing Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1554, 220 U.S.P.Q. (BNA) 193, 203 (Fed.Cir. 1983)). Even though an appeal is judged 'entirely without merit,' see Romala, 927 F.2d at 1222, it may have presented an arguable basis for reversal, and thus not qualify for sanctions. By its bare assertion,

Loredan necessarily failed to demonstrate that the appeal of Biodex was nude of arguable issues." Emphasis added. Biodex at 863. Compare **Appn 3¶(2) and 4¶(4).**

C. Conflict With The Fifth Circuit (Judgment Is Void)

The judgment for attorney's fees (**Appn 53-54**) was not accompanied, on its face, or upon any procedure leading to judgment (**Appn 0-6, 53-54**), by citation to any brief, or the record, or specification of the factual bases for the judgment. The process due for the order concluding that the appeal was frivolous (**Appn 4**) or in bad faith (**Appn 4-5**) was notice and an opportunity to be heard. Roadway Express Inc., supra, 447 U.S. at 764, 766-768. The judgment at Bench was secured without notice and without evidence, or the barest reference to the record. In an analagous situation, the Fifth Circuit has held a default judgment taken without notice or evidence, was void. Bass v. Hoaghand, 172 F.2d 205, 210 (5th Cir. 1949).

Additionally, the Fifth Circuit, like the Second Circuit (in Heller Financial, 833 F.2d at 1295), provides that plausibility of an appeal precludes it from being found frivolous. FDIC v. First State Bank of Asilene, 779 F.2d 242, 244 (5th Cir. 1985).

D. Conflict With The Ninth Circuit

The Hawaii Supreme Court's unsupported assertion of claim preclusion (**Appn 3-5**) also conflicted with the Ninth Circuit Court of Appeals' standard that an appeal is considered frivolous when the result is obvious or the appellant's arguments of error are wholly without merit.

Sheet metal Workers Int'l Assn Local No. 162 v. Jason Mfg, 900 F.2d 1392, 1990 (9th Cir. 1990). Emphasis added.

The mere fact that an appeal is frivolous does not of itself establish bad faith. To establish bad faith on this record, a hearing or a meaningful opportunity to respond was required. United States v. Blodgett, 709 F2d 608, 610 (9th Cir 1983). More was needed here to support a finding of bad faith or frivolousness grounded on issue preclusion. **Appn 3, 4.**

III. HAWAII SUPREME COURT DECIDED IMPORTANT FEDERAL QUESTION OF SANCTIONS ON APPEAL IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Hawaii Supreme Court did not comply with the federal mandates of due process. Chambers v. NASCO, supra, 501 U.S. at 49, 111 S.Ct at 2135. As the commentary to the 1994 amendment to FRAP 38 made clear: "The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the this Court's opinion in *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 ..."

The availability of reconsideration motions or objections to amounts of sanctions do not mitigate the violation of the due process clauses of the 5th and 14th Amdts, US CONST. These procedures are the precise kinds of "favor or discretion" rejected by this Court in Coe v. Armour Fertilizer Works, 237 U.S. 413, 423-426, 35 S.Ct. 625, 628-629 (1915). "Nor can extra-

official or causal notice, or a hearing granted as a matter of grace or discretion, be deemed a substantial substitute for the due process of law that the constitution requires." Id at 424, 35 S.Ct. at 629.

IV. SUA SPONTE CONCLUSION OF FRIVOLOUSNESS WITHOUT AN OPPORTUNITY TO RESPOND PRIOR TO THE CONCLUSION VIOLATED THE DUE PROCESS CLAUSE, 14TH AMDT

One purpose of notice and an opportunity to respond is to determine whether the appeal, though unsuccessful, was based on some arguments which were plausible. Plausibility defeats the finding of frivolousness. Heller Financial Inc. v. Midwhey Powder Co., supra, 883 F.2d at 1295. Not only were the arguments at Bench plausible, but had the Hawaii Supreme Court's assertion of issue preclusion been based on the record, the Court could not have justified either the sanctions, or its affirmance of the lower court in favor of the insurance company. See **Appn 3-5** (court's lack of specificity); and see **Appn 106-108** (the insurer's failure to base its issue preclusion arguments on any fact in the record).

The Hawaii Supreme Court deployed its inherent power (**Appn 3-5**) to disregard the unambiguous language of its own rule, HRAP 38: "It may, after a separately filed motion or notice from the appellate court, and reasonable opportunity to respond ..." Emphasis added.

But this Court, has cautioned: "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process,

both in determining that the requisite bad faith exists and in assessing fees." Chambers v. NASCO, supra, 501 U.S. at 49, 111 S.Ct. at 2135. Emphasis added. Resolution Trust v. Bright, 6 F.3d 336, 341-42 (5th Cir. 1993) (reversing attorney disbarment because the record did not support the district court's bad faith finding).

Here, the Hawaii Supreme Court justice authoring the order asserting that Petitioner's appeal was frivolous (**Appn 4¶(4)**), contended that Petitioner was making the "same arguments" rejected in an earlier appeal. Id. As in Resolution Trust, supra, there were no indications to show which, if any, arguments were the same; and, the record itself does not contain evidence to support such a finding. 6 F.3d at 342. **Appn 4¶(4); Appn 80-82.**

The Federal Rules Of Appellate Procedure is similar to the Hawaii version:

> **"FRAP Rule 38. Frivolous Appeal-Damages and Costs:**
>
> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. (As amended Apr. 29, 1994; Apr. 24, 1998, eff. Dec. 1, 1998)."

The commentary to the federal rule is persuasive and instructive here:

"1994 Amendments

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767 (1980), that notice and opportunity to respond must **precede** the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the Court's discretion." Emphasis added.

From the scant information provided by the Hawaii Supreme Court's sanctions order (**Appn 3-6**), no careful response could have been made, even if the court had provided notice. Notice would not, even if given, have adequately informed Petitioner of the grounds upon which the frivolousness sanction was based, so that he could fashion a response. It is for this reason that adequate prior notice must precede the imposition of sanctions. A sua sponte conclusion of bad faith or frivolousness itself does not substitute for notice, particularly adequate notice. Coe, supra, 237 U.S. at 423-426.

V. EXTREME, SUA SPONTE ASSERTION OF PRECLUSION VIOLATED THE U.S. CONST FIRST AMDT PETITION/EXPRESSION CLAUSES, THE FIFTH/FOURTEENTH AMDT DUE PROCESS CLAUSES, AND THE FOURTEENTH AMDT EQUAL PROTECTION CLAUSE

Without mention of the record, AIG concluded, as did the Hawaii Supreme Court that several issues were argued in the first and second appeals. **Appn 3, 4, 106-108.** AIG was required to show that the issues (refusal to pay claims for medical office visits, alleged unbundled claims, downcoding) were determined by the prior judgment. The reason for specification is that the judgment of injunction was only conclusive if all of the issues leading to it were necessary to the judgment. Restatement Judgments Second §27, Comments g and h would be dispositive, had AIG shouldered its burden to demonstrate preclusion:

> *"g. **If several issues litigated**.* If several issues are litigated in an action, and in a subsequent action between the parties, one of the parties relies on the judgment as conclusive of one of the issues, that party must show that the issue was determined by the judgment in the prior action.
>
> If several issues are litigated in an action, and a judgment cannot properly be rendered in favor of one party unless all of the issues are decided in his favor, and judgment is given for him, the judgment is conclusive with respect to all the issues.
>
> ... ...
>
> *h. **Determinations not essential to the judgment*** If issues are determined but the judgment is not dependent upon the determinations, relitigation of

those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and my not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation." Id. Emphasis added.

Hawaii own jurisprudence, when evenly applied, places the burden on the proponent of issue preclusion to establish the assertion. Lingle v. HGEA, 107 Haw 178, 186, 111 P.3d 587, 595 (2005).

VI. THE STATE AGENCIES AND COURTS DEPRIVED PETITIONER OF HIS RIGHT TO WORK

Under any standard of review, there is no reason for Hawaii agencies and courts to single Petitioner out for disparate treatment from other physicians licensed in the state who provide services in the scope of their practice.

The decisions below violated the 14th Amdt right to equal protection. Smith v. Texas, 233 U.S. 630, 641, 34 S.Ct. 681 (1914), for the following separate, but related reasons.

Respondent Commissioner freely violated the state's insurance laws and encouraged insurers to do the same. **Appn 119, 120, 140-145.** The commissioner could not make up new rules limiting Petitioner's practice of medicine by fiat. This ad hoc rulemaking is not reasonable government regulation in compliance with

administrative procedures or separation of powers. **Appn 116.**

By upholding the commissioner, the courts, like the agency interfered with Petitioner's right to work for a living. Truax v. Reich, 23 U.S. 33, 41, 36 S.Ct. 7 (1915); Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400 (1959).

The hasty decision by the Hawaii Supreme Court (**Appn 0-6**) bars Petitioner from practicing medicine in a standardless and unspecified way, linking even office visits by doctors to physical therapy. The state's decisions, and its structurally biased tribunals violate the due process clauses of the 5th And 14th Amdt and exclude Petitioner, a medical doctor, from his board certified specialty of physiatry. Conn v.Gabbert, 526 U.S. 286, 292, 119 S.Ct. 1292 (1999).

VII. DECISION WAS RETALIATORY AND MOTIVATED BY ILL WILL

The Hawaii Supreme Court's decision (**Appn 0-6**) retaliated against Petitioner because of his exercise of his First Amendment rights of petition and advocacy. The motivation was to terrorize Petitioner, and displays personal animus, ill will, and an effort to "get" Petitioner; first, for complaining to the trial judge that the Hawaii Supreme Court was delaying related cases involving other providers, for years over "a simple issue over a simple statute" (**Appn 145-146**) allowing insurers not to pay. Petitioner was referring to Orthopedics Associates, supra, 109 Haw at 196 (Duffy, J., and two other justices recused), and other pending cases.

The second reason the Hawaii Supreme Court retaliated in its May 18, 2006 order (**Appn 0-6**), is that Petitioner sued officials of the state judiciary on March 14, 2006. **Appn 155**. The suit is based on the state's deputizing of paid representatives of litigants with active cases pending, to be state judiciary officials charged with judicial section. **Appn 160-163**.

Petitioner and other Hawaii health providers have no timely or adequate remedy against insurers who don't pay because four of the nine judicial retention votes belong to those insurance companies. **Appn 162-167**. Retention of a judge or justice is the exclusive and secret decision of a simple majority of a quorum of this commission. **Appn 162**. A quorum is only five (5). **Appn 162**.

New applicants to the Bench (as was Justice Duffy in 2003) are selected by the governor with the exception of limited jurisdiction (district) courts. But the litigant-dominated commission prepares a "short list", passing over applicants these private litigant/state officials do not like. **Appn 161-163**.

The Hawaii Judicial Selection Commission ("HJSC") officials are political appointees. **Appn 160**. Historically, these officials do not have any credentials or expertise in selecting the best and brightest individuals for judicial service. Id. One was recently indicted and convicted of insurance-related crimes. **Appn 164**. Of the nine officials now serving, four are paid by insurers, and they have fiduciary duties of undivided loyalty, not to state citizens, or to the state judiciary, but to the insurance companies, including AIG. **Appn 165**.

In the few cases health providers have won against these insurers, the delay helps the insurers earn interest income. Orthopedics Associates, supra, 109 Haw at 191, 124 P.3d at 936. **Appn 169-170**. In Orthopedics Associates, the State Supreme Court avoided clear direction about remedies on remand to get 322 health providers paid. Id at 124 P.3d 942.

In other cases, as one judge has admitted, judges have withheld decisions until their reappointments are secured. **Appn 169-171**.

This trammeling of civil rights, is far worse than Ward v. Village of Monroeville, 409 U.S. 57, 60, 93 S.Ct 80, 83 (1972), because short lists made by insurance representatives and other political appointees pass over numerous better qualified applicants for the State Bench, thus maintaining corruptly compromised standards of competence with obvious long-term implications. Unlike Ward, the effects of litigant-directed judicial selection injure all courts in the state.

Associate Justice Duffy should have recused himself, as he did in two prior cases involving Respondent AIG. Orthopedics Associates, supra; AIG v. Pain Mgmt Clinic, (2006) Haw LEXIS 10 (1-9-2006) SC 26743 (unpublished). But recusal of interested, biased or prejudiced judges, in the context of structural bias, "requires too much and protects too little." Ward v. Village of Monroeville, supra, 409 U.S. at 60, 93 S.Ct. at 83.

"This, too is a situation in which an official perforce occupies two practically and serious position, one partisan and the other judicial and necessarily involves a lack of due process of law ..." Ward, 409 U.S. at 60.

Petitioner's suit against the judicial selection machine claims Hawaii's judges and justices have direct, pecuniary interest in the Hawaii Judicial Selection Commission which is charged exclusively with reappointment of sitting judges. **Appn 163, 165, 167-169, 171, 172.** Since the HJSC placed sitting judges on "short lists" for the governor at initial appointment there is a debt of gratitude, for all who please these private, state officials.

Since the HJSC, according to state usage and policy encourages its nine voting state officials to be paid all, or a substantial part of their salary, by litigants with active cases in the courts, when those litigants appear before state judges or justices, as here, there is a substantial, direct pecuniary interest in favor of that litigant; here, AIG.

The historical roots of the courts' structural bias, and animus toward all who complain about it go back to a 1978 change in Hawaii's constitution which barricaded state judicial selection from both electoral processes and merit determinations. The new process guaranteed that political insiders and former judges would continue to be appointed by the Hawaii Supreme Court to Hawaii's Bishop Estate, an institution dedicated to educating Hawaiian children. S.King, and R. Roth, *Broken Trust: GREED, MISMANAGEMENT and POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST."* 3, 4 (2006) ("Broken Trust").

At stake, were $1,000,000 or so yearly salaries for trustees, then appointed by the Hawaii Supreme Court.

United States District Judge King and University of Hawaii law Professor Roth, refer in their book to the

selection process for Bishop Estate trustees in 1994 as "horse trading that was known to occur in sessions of the Judicial Selection Commission, where [the governor's] insiders were adept at getting 'the right name' added to each judicial selection list." Id at 91. The authors of *Broken Trust* report that one attorney who had finished chairing the HJSC received over ten million in legal fees from Bishop Estate, for his firm. Id at 163.

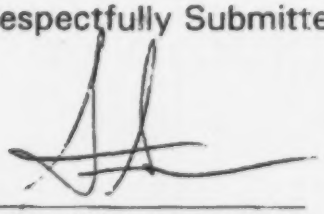
It is because of insurer control of judicial section that, structurally, the courts in this case took heroic and unconstitutional measures to please litigants who are insurance companies, including Respondent AIG. U.S. v. Cross, 128 F.3d 145, 149 (3d Cir. Pa 1997).

CONCLUSION

The Petition should be granted.

Dated: Honolulu, Hawaii, August 14, 2006.

Respectfully Submitted,



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APPENDIX

FILED

2006 May 18 AM 10:49

K.HAMAKADO

CLERK, APPELLATE COURTS

STATE OF HAWAII

* * * NOT FOR PUBLICATION * * *

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant-Appellant,

vs.

J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii Appellee-Appellee,

and

AIG HAWAII INSURANCE CO., Respondent-Appellee-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2106)

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SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.; with Acoba, J., Concurring Separately and Dissenting)

Provider-appellant-appellant Emerson M.F. Jou, M.D. (Dr. Jou), appeals from the September 9, 2004 final judgment of the Circuit Court of the First Circuit in favor of appellee-appellee J.P. Schmidt, Insurance Commissioner (Commissioner), Department of Commerce and Consumer Affairs (DCCA), State of Hawai'i and respondent-appellee-appellee AIG Hawaii Insurance Co. (AIG).[1] On appeal, Dr. Jou argues that the circuit court erred by: (1) violating his right "to work in a common occupation in his community" guaranteed by the due process clause of the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawai'i Constitution; (2) affirming

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[1] The Honorable Sabrina S. McKenna presided over this matter.

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the Commissioner's violation of the separation of powers doctrine as set forth in article V, section 6 of the Hawai'i Constitution and in the United States Constitution by engaging in illegal legislative conduct when he rewrote Hawai'i Revised Statutes (HRS) § 452-1 (1993) (defining "massage" and "massage therapy") to eliminate clauses supporting Dr. Jou's right to work as a physiatrist employing licensed massage therapists; (3) violating the equal protection clauses of the fourteenth amendment to the United States Constitution and article 1, section 5 of the Hawai'i Constitution; (4) violating the rules of statutory construction requiring the

court to give force to and preserve all the words of HRS § 452-1; and (5) affirming the Commissioner's reliance on AIG's witness, Darcy Tavares, as an expert on bill coding when (a) her testimony was superfluous, and (b) she had "no license qualifying her to testify about the application of law or medicine to the physicians' billing codes." The Commissioner responds that: (1) the circuit court did not err in affirming the October 13, 2003 Commissioner's Final Order (CFO); and (2) Dr. Jou has failed to present any discernible argument in support of his assignments of error and thus his claims should be disregarded. AIG joins in the Commissioner's brief and also answers in its own right, arguing that:

(1) Dr. Jou's claims are barred by res judicata because they were already raised and ruled upon by this court's Summary Disposition Order (SDO) in AIG Hawaii Insurance Co. v. Jou, No. 24566 (Aug. 24, 2004); and (2) the circuit court did not err in affirming the CFO.

Upon carefully reviewing the record and briefs submitted, we hold as follows:

(1) Dr. Jou's constitutional claims are deemed waived for failure to raise them below.[2] Generally, "[i]ssues not properly raised on appeal will be deemed to be waived." Bitnev v. Honolulu Police Dep't, 96 Hawaii 243, 251, 30 P.3d 257, 265 (2001) (alteration in original) (quoting Hill v. Inouye, 90 Hawaii 76, 82, 976 P.2d 390, 396 (1998)). Assuming arguendo that the arguments were not waived, this court nevertheless disregards the constitutional claims for failure to present a discernible argument. See State v.

2 Although Dr. Jou may have attempted to raise constitutional claims at oral argument in the circuit court, his failure to timely request the transcript precludes this court's consideration of errors allegedly made or raised therein. See Hawaii Rules of Appellate Procedure (HRAP) Rule 10(b)(1)(A) ("[A]n appellant [who] desires to raise any point on appeal that requires consideration of the oral proceedings before the court . . . appealed from . . . shall file, within 10 days after filing the notice of appeal, a request to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary[.]"). Here, Dr. Jou first filed a transcript request on October 26, 2004, more than 10 days after he filed his notice of appeal on October 8, 2004.

Moreover, Dr. Jou's attempt to reserve his claims of constitutional error in his circuit court brief fails because there was no bar precluding him from raising those claims below. See HRS § 91-14(g)(1) (indicating that the circuit court has jurisdiction to consider claims of constitutional error in an agency appeal).

Moore, 82 Hawaii 202, 206 n.1, 921. P.2d 122, 126 n.1 (1996) (holding that this court may disregard a claim where a proponent fails to make any discernible argument in support thereof). Here, Dr. Jou has failed to apply any constitutional standard to an identified statute or ruling and explain how the allegedly offending statute or ruling violates his constitutional rights either facially or on the facts presented;

(2) Dr. Jou is precluded from relitigating the issue of whether an insurer is obligated to reimburse a licensed physician/medical provider *for* physical therapy services provided by third parties not licensed as physical therapists or physicians but acting under the physician/provider's supervision because the same issue was already decided against him on the merits in the summary disposition order of this court in AIG Hawaii ins. Co. v. Jou, No. 24566, 2004 WL 1879846 (Haw. Aug. 24, 2004). See Exotics Hawaii-Kona,

Inc. v. E.I. Dupont De Nemours & Co., 104 Hawai'i 358, 365, 90 P.3d 250, 257 (2004) ("Issue preclusion applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action." (Internal quotation marks, citation, and emphases omitted.)); HRAP Rule 35(c) (providing that unpublished dispositional orders may be cited for collateral estoppel purposes);

(3) Dr. Jou's contention that the Commissioner erred by admitting expert testimony from an unqualified witness, Darcy Tavares, is deemed waived because Dr. Jou fails to argue it in his brief. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived."); and

(4) We determine that this secondary appeal is frivolous because it was filed -- despite the lack of any material change in the facts, law, or arguments advanced --only six weeks after this court rejected the same arguments made by Dr. Jou in No. 24566, a decision binding against him, see Point (2), supra. It thus demonstrates a bad faith refusal to acknowledge controlling authority. See HRAP Rule 38 (providing that the appellate court may on its own initiative find an appeal frivolous, and, after notice and an opportunity to respond, award damages, including fees and costs, to the appellees); Rhoads v. Okamura, 98 Hawai'i 407, 414, 49 P.3d 373, 380 (2002) (defining a frivolous appeal as one so manifestly and palpably without merit as to indicate bad

faith on the pleader's part) (citation omitted); Gold v. Harrison, 88 Hawai'i 94, 107, 962 P.2d 353, 366 (1998) (imposing HRAP Rule 38 sanctions where the appellant knowingly "refus[ed] to acknowledge controlling authority"); see also Hawaii Rules of Professional Conduct (HRPC) Rule 3.1 ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."). Accordingly, a sua sponte sanctions order is appropriate to "protect the courts -- and derivatively parties in other cases -- from impositions on their time [because t]he court has an interest in the orderly conduct of business[.]" Abastillas v. Kekona, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998) (internal quotation marks and citation omitted). Therefore,

IT IS HEREBY ORDERED that the circuit court's September 9, 2004 final judgment is affirmed. We also hereby give notice to the parties that the instant secondary appeal was frivolous and request briefing with regard to damages and costs to be awarded to AIG and the Commissioner as authorized by HRAP Rule 38. Briefs by AIG and the Commissioner shall be submitted within 15 days of the date of this order and Dr. Jou's response thereto shall be submitted within 15 days thereafter.

DATED: Honolulu, Hawai'i, May 18, 2006.

"s/C.J. Moon", "s/Steven Levinson"
"s/Paura A Nakayama", "s/James Duffy"

On the briefs:

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For respondent-appellee
AIG Hawaii Insurance Company

*****NOT FOR PUBLICATION*****

CONCURRING AND DISSENTING OPINION

BY ACOBA, J.

I concur in the disposition of the appeal, but not on the determination of frivolousness. I would give notice to and allow responses by the parties on the question of frivolousness, before deciding that question. **"s/Acoba, J."**

FILED

2006 July 10 AM 11:44

NORMA T. YARA

CLERK, APPELLATE COURTS

STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant-Appellant,

vs.

J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii Appellee-Appellee,

and

AIG HAWAII INSURANCE CO., Respondent-Appellee-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2106)

ORDER GRANTING IN PART AND DENYING IN PART REQUESTS FOR FEES AND COSTS

(By Duffy, J., for the court[1])

On May 18, 2006, this court entered a Summary Disposition Order resolving a billing dispute between an insurer and medical provider by affirming the Circuit Court of the First Circuit's September 9, 2004 final judgment affirming the Insurance Commissioner's October 13, 2003 final order in favor of respondent-appellee-appellee AIG Hawaii Insurance Co. (AIG) and against provider-appellant-appellant Emerson M.F. Jou, M.D., in Jou v. Schmidt, No. 26877, 110 Hawai'i 418, 133 P.3d 1210, 2006 WL 1352327 (Haw. May 18, 2006), recon. denied, 2006 WL 1660572 (Haw. June 13, 2006). In addition, this court found sua sponte, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 38,[2] that Dr. Jou's instant secondary appeal was frivolous. Jou, slip op. at 5. As a result, we issued the following notice and directive to the parties:

> We . . . hereby give notice to the parties that, the instant secondary appeal was frivolous and request briefing with regard to damages and costs to be awarded to A1G and the Commissioner as authorized by HRAP Rule 38. Briefs by AIG and the Commissioner shall be submitted within 15 days of the date of this order and Dr. Jou's response thereto shall be submitted within 15 days thereafter.

Jou, slip op. at 7.

Subsequently, on May 30, 2006, Katharine M. Nohr, attorney for AIG, filed a "Request for Attorney's Fees and Costs and Declaration of Counsel." On June 2, 2006, David A. Webber, attorney for appellee-appellee Insurance Commissioner J.P. Schmidt, Department of Commerce and Consumer Affairs, State of Hawaii (the Commissioner), filed a "Brief re: Damages and Costs." On June 13 and June 19, 2006, Stephen M. Shaw, attorney for Dr. Jou, filed timely papers in opposition, arguing that: (I) the instant secondary appeal was not frivolous; and (2) the amounts claimed by counsel are unreasonable. Having carefully reviewed the requests and Dr. Jou's opposition, as well as the record, we grant the requests to the extent that they are reasonable and deny them as to the remainder. Therefore,

IT IS HEREBY ORDERED that: (1) Mr. Webber's request for fees is granted in the amount of $2,500.00, to be taxed against Dr. Jou and paid to the Commissioner; and (2) Mr. Webber's request for costs, also to be taxed against Dr. Jou and paid to the Commissioner, is granted in the amount of $36.00. It is further ordered that: (1) Ms. Nohr's request for fees, to be taxed against Dr. Jou and paid to AIG, is granted in the amount of $2,756.00; and (2) Ms. Nohr's request for costs, also to be taxed against Dr. Jou and paid to AIG, is granted in the amount of $48.62.

DATED: Honolulu, Hawai'i, July 10, 2006.

FOR THE COURT:

"s/James E. Duffy"

Associate Justice

Katharine M. Nohr
(Of Miyagi Nohr & Myhre), for
respondent-appellee-appellee
AIG Hawaii Insurance Co.
On the request

David A. Webber and
Deborah Day Emerson,
Deputy Attorneys General,
for appellee-appellee
Insurance Commissioner,
State of Hawai'I on the request

Stephen M. Shaw
for provider-appellant-appellant
Emerson M.F. Jou, M. D., in opposition

DISSENT BY ACOBA, J.

Based on my concurring and dissenting opinion filed herein, I would not grant the present request for fees and cots.

"s/Acoba, J."

---

[1]Considered by: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

[2] HRAP Rule 38 states:

> If a Hawai'i appellate court determines that an appeal decided by it was frivolous, it may, after a separately filed motion or notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee.

MARK J. BENNETT 2672
Attorney General of Hawaii

DAVID A. WEBBER 5161
DEBORAH DAY EMERSON 3668
Deputy Attorneys General
Department of the Attorney General,
State of Hawai'i
425 Queen Street
Honolulu, Hawaii 96813

Telephone: (808) 586-1180
Facsimile: (808) 586-1205

Attorneys for Appellee
J.P. Schmidt, Insurance
Commissioner,
Department of
Commerce and Consumer Affairs, State of Hawaii

1st Circuit Court
2004 SEP-9 PM 1:50
M.N. TANAKA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant,	Civil No.03-1-2106-10(SSM) (Agency Appeal)
vs.	JUDGMENT
J.P. SCHMIDT, Insurance Commissioner, Department Of Commerce and Consumer Affairs, State of Hawai'i, Appellee,	
AIG HAWAII INSURANCE CO., Defendant.	

EXHIBT "A'

JUDGMENT

This matter having been heard by the court, and the court having entered its ORDER AFFIRMING COMMISSIONER'S FINAL ORDER, FILED OCTOBER 13, 2003, filed on July 13, 2004,

IT IS HEREBY ORDERED AND ADJUDGED that judgment enter for Respondent-Appellee AIG Hawaii Insurance Company, and Appellee J.P. Schmidt, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii, and against Provider-Appellant Emerson M.F. Jou, M.D., and that the Commissioner's Final Order, filed October 13, 2003, in Insurance Division, Department of Commerce and Consumer Affairs Docket No. MVI-2002-34-P is Affirmed, and the appeal is dismissed.

There are no other claims and no other parties to this action. This is a final judgment.

DATED: Honolulu, Hawaii, _____.

"s/"
SABRINA S. McKENNA
CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

"s/Stephen M. Shaw"
Stephen M. Shaw, Esq.
Attorney for Provider-Appellant

"s/Kathryn M. Nohr"
Kathryn M. Nohr, Esq.
Attorney for Respondent-Appellee AIG Ins. Co.

[Jou v. Schmidt and AIG Hawaii Ins. Co., Civil No. 03-1-2106-10 (SSM); JUDGMENT]

Of Counsel:
MIYAGI, NOHR & MYHRE

KATHARINE M. NOHR 4828-0
1001 Bishop Street,
Pauahi Tower, Stuite 1200
Honolulu, HI 96813

Attorney for Respondent-Appellee
AIG HAWAII INSURANCE CO.

1st Circuit Court
2004 JUL 13 pm 3:43
F. OTAKE
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant, vs. J.P. SCHMIDT, Insurance Commissioner, Department Of Commerce and Consumer Affairs, State of Hawai'i, Appellee, AIG HAWAII INSURANCE CO., Respondent-Appellee,	Civil No.03-1-2106-10(SSM) (Administrative Appeal) ORDER AFFIRMAING COMMISSIONER'S FINAL ORDER FILED OCTOBER 13, 2003 Oral Argument: Date: June 1, 2004 Time: 11:30 p.m. Judge: Sabrina McKenna

ORDER AFFIRMING COMMISSIONER'S
FINAL ORDER FILED OCTOBER 12, 2003

On June 1, 2004, oral argument regarding administrative appeal was conducted before the Honorable Sabrina McKenna with Katharine M. Nohr, Esq. appearing on behalf of Respondent-Appellee AIG HAWAII INSURANCE COMPANY, David Webber

appearing on behalf of Appellee J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii and Stephen Shaw, Esq. appearing on behalf of Provider-Appellant EMERSON M.F. JOU, M.D., and after reviewing the memorandum submitted by the parties and hearing the argument of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to *HRS* §91-14(g), the court found the following: that there was no violation of constitutional or statutory provisions; the decision was not in excess of the statutory authority or jurisdiction of the agency; it was not made upon unlawful procedure, was not effected by other error of law, it was not clearly erroneous in view of the reliable, prohibitive and substantial evidence on the whole record nor was it arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said Commissioner's Final Order is hereby affirmed.

Dated: Honolulu, Hawaii, JUL 12, 2004

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

"s/David Webber"
DAVID WEBBER

Attorney for Appellee
J.P. SCHMIDT, Insurance Commissioner,
Department of Commerce and Consumer Affairs, State of Hawaii

"s/Stephen M. Shaw"
Stephen M. Shaw, Esq.
Attorney for Provider-Appellant
EMERSON M.F. JOU, M.D.

Jou (Watanabe) v. Schmidt et al.,
Civil No. 03-1-2106-10 (SSM);
Order Affirming Commissioner's Filed October 13, 2003

1st CIRCUIT COURT
STATE OF HAWAII
FILED
2004 MAR 10 PM 1:41
R. HIGA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

In the Matter of the Implementation of the	)	Civil No.03-1-2106-10 (EEH) (Agency Appeal)
INDIVIDUAL TRIAL CALENDAR SYSTEM, FIRST CIRCUIT COURT, STATE OF HAWAII	)	ORDER OF CASE ASSIGNMENT

ORDER OF CASE ASSIGNMENT

The case entitled Emerson M.F. Jou, M.D. vs. J.P. Schmidt, Insurance Commissioner. Department of Commerce and Consumer Affairs. State of Hawaii, Civil No. 03-1-2106-10 (EEH), is assigned to the Honorable Sabrina S. McKenna, Judge, Circuit Court of the First Circuit, State of Hawai'i, for all further activity in this case (including motions, oral argument and disposition).

All future pleadings filed in this case shall include the letters ("SSM") as part of the case number, which indicates that the case is assigned to the Honorable Sabrina S. McKenna.

DATED: Honolulu, Hawaii, MAR 10, 2004.

"s/K.N. Blondin"
KAREN N. BLONDIN
Judge of the Above-Entitled Court

Notice Sent via U.S. Mail

Stephen M. Shaw, Esq. P. O. Box 2353
Honolulu, Hawaii 96804

David A. Webber, Esq. Deborah Day Emerson, Esq.
Deputy Attorneys General Department of the Attorney
General 425 Queen Street
Honolulu, Hawaii 96813

Katherine Nohr, Esq.
Miyagi Nohr & Myhre 1001 Bishop Street
Pauahi Tower, Suite 1200 Honolulu, Hawaii
96813

I HEREBY CERTIFY THAT THE ATTACHED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THE DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS.

_____

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS
2003 OCT 13 P 12:31
HEARINGS OFFICE

INSURANCE DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII

In the Matter of the Request	)	MVI-2002-34-P
for Payment of EMERSON M.F.	)	COMMISSIONER'S
JOU, M.D., as Provider	)	FINAL ORDER
for Albert Watanabe,	)	
Provider,	)	
vs.	)	
AIG HAWAII INSRUANCE CO.,	)	
Respondent.	)	

COMMISSIONER'S FINAL ORDER

On December 26, 2002, the duly appointed Hearings Officer submitted his Recommended Order Adopting Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Order in the above-entitled matter to the Insurance Commissioner ("Commissioner") of the Department of Commerce and Consumer Affairs, State of Hawaii. Copies of the Hearings Officer's recommendations were also transmitted to the parties. The parties were provided with an opportunity to file written exceptions.

On January 8, 2003, Provider Emerson M. F. Jou, M.D., ("Provider") filed a request for oral argument and exceptions to the recommended order. On January 22, 2003, Respondent AIG Hawaii Insurance Co. ("Respondent") filed a statement in support of the recommended order.

On August 28, 2003, oral arguments were heard by the Commissioner.

Upon review of the entire record of this proceeding, the Commissioner adopts the Hearings Officer's proposed decision as the Commissioner's Final Order. Accordingly,
the Commissioner finds and concludes that Provider failed to establish by a preponderance of the evidence that: (1) Respondent was required to pay for physical therapy provided by persons not licensed to perform physical therapy; (2) Respondent was required to pay for myofascial release at a rate other than the massage therapy rate; (3) Respondent was required to pay for an office visit provided on 8/7/96 at code 99205 rather

than 99204; and that (4) Respondent was required to pay for state taxes when they were already included in the Medicare Fee Schedule.

The Commissioner orders that the parties each bear their own attorney's fees and costs incurred in this matter.

DATED: Honolulu, Hawaii, OCT 13, 2003.

"s/J. P. Schmidt"

Insurance Commissioner
Department of Commerce and Consumer Affairs

I HEREBY CERTIFY THAT THE ATTACHED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THE DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS.

_____

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS
DEC 26 9:19 AM '02
HEARINGS OFFICE

INSURANCE DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII

In the Matter of the Request	) MVI-2002-34-P
for Payment of EMERSON M.F.	) HEARINGS OFFICER'S
JOU, M.D., as Provider	)RECOMMENDED ORDER
for Albert Watanabe,	) ADOPTING RESPONDE-
Provider,	) NT'S PROPOSED FIND-
vs.	) DINGS OF FACT,
AIG HAWAII INSRUANCE CO.,	) CONCLUDSIONS OF
Respondent.	) LAW AND
	RECOMMENDED
	ORDER; ATTACHMENT A

HEARINGS OFFICER'S RECOMMENDED ORDER ADOPTING RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

After reviewing and considering the evidence and arguments presented at the hearing in the above-referenced matter, together with the entire record of the proceedings, the undersigned Hearings Officer found in favor of the Respondent AIG Hawaii Insurance Company ("Respondent"). The Hearings Officer requested Respondent's attorney to prepare proposed findings of fact, conclusions of law and recommended order for review and adoption by the Hearings Officer.

On December 19, 2002, Katharine Nohr, attorney for Respondent, submitted Respondent's proposed findings of fact, conclusions of law and recommended order.

Accordingly, the Hearings Officer hereby adopts the Respondent's proposed findings of fact, conclusions of law and recommended order, attached hereto as Attachment A and incorporated herein.

DATED: Honolulu, Hawaii, DEC 26, 2002.

"s/Rondey A. Maile"
RONDEY A. MAILE
Senior Hearings Officer
Department of Commerce and Consumer Affairs

Of Counsel:
MIYAGI, NOHR & MYHRE

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS
DEC 19, 3:39 PM '02

KATHARINE M. NOHR 4828-0
1001 Bishop Street,
Pauahi Tower, Stuite 1200
Honolulu, HI 96813

Attorney for Respondent
AIG HAWAII INSURANCE CO.

INSURANCE DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII

In the Matter of the Request	)	MVI-2002-34-P
for Payment of EMERSON M.F.	)	
JOU, M.D., as Provider	)	
for Albert Watanabe,	)	
Provider,	)	
vs.	)	
AIG HAWAII INSRUANCE CO.,	)	Hearings Officer
Respondent.	)	Rodney A. Maile

RESPONDENT AIG HAWAII INSURANCE COMPANY'S PROPOSED FINDING OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

Comes now Respondent AIG HAWAII INSURANCE COMPANY (hereinafter referred to as "AIG"), by and

through its attorneys, Miyagi, Nohr & Myhre and hereby submits its proposed Findings of Fact, Conclusions of Law and Recommended Order.

I. FINDINGS OF FACT

1. On January 18, 1995, Dr. Jou notified "All Insurance Companies" by letter of the names and the massage therapy license numbers of the therapists that were currently working at his office. In such letter, Dr. Jou handwrote the following: "The treatment was prescribed and provided as physical therapy which includes hotpacks, ultrasound, massage and exercises. It was carried out by the above designated therapists under my direct supervision...."

2. In March of 1998, Dr. Jou again wrote to "All Insurance Companies" providing the names and massage therapy license numbers of the therapists that were currently working at his office.

3. Dr. Jou provided services to Albert Watanabe from August 7, 1996 to February 13, 1997, submitting the bills to Watanabe's no-fault insurer, AIG. AIG paid a portion of such bills determining that certain amounts were not payable in accordance with the worker's compensation fee schedule or other applicable laws.

4. Dr. Jou submitted treatment notes supporting the physical therapy services performed from August 7, 1996 to February 13, 1997. The therapists who signed those notes indicating that they performed the services were licensed massage therapists and were not licensed physical therapists.

5. AIG, having been informed that licensed

massage therapists were performing physical therapy without licenses to perform physical therapy, determined that the treatment was provided outside the scope of the provider's specialty. Payments were not allowed for hot or cold packs therapy, ultrasound therapy and therapeutic exercises. Myofascial release performed by massage therapists was paid in accordance with the massage therapy rate, providing the maximum allowance under the worker's compensation fee schedule.

6. Darcy Tavares, a certified professional Coder and licensed Independent Bill Reviewer, and coder for AIG, reviewed the audits prepared by her predecessor at AIG, determining that the bill reviews done by AIG had been done properly.

7. Billings for an Office Visit on August 7, 1996, were submitted under code 99205. AIG paid in accordance with code 99204, which best described the service performed by Dr. Jou.

8. Dr. Jou charged for state tax in all billings at issue. AIG did not pay for state tax, explaining in its Explanation of Review's that "No allowance was made for tax as the medicare fee schedule value already includes tax." In a letter dated October 30, 1995, an analyst from the Medicare Claims Administration confirmed that the Medicare allowances include tax.

II. CONCLUSIONS OF LAW

The issue presented for determination was whether billings submitted by Dr. Emerson Jou from August 7, 1996 through February 13, 1997 for

services provided to Albert Watanabe, were properly audited by AIG in accordance with Hawaii law. The billings at issue included services provided by licensed massage therapists for hot or cold pack therapy, therapeutic exercises, ultrasound therapy and myofascial release; an office visit provided by Dr. Jou on August 7, 1996, and state tax during the entire period of treatment at issue.

In order to prevail in this matter, the Provider has the burden of producing credible evidence and establishing by a preponderance of the evidence that the payments issued by AIG in accordance with its Explanation of Reviews were improper. HRS s. 91-10(5) and *HAR* §16-201-21(d).

In Memorandum 1995-61, Insurance Commissioner Wayne Metcalf, issued on August 7, 1995, stated that "In Section 7 of Act 234, the Workers' Compensation Medical Fee Schedule contained in Title 12, Chapter 13, HAR, as Exhibit "A" was replaced by the Medicare Fee Schedule. More specifically, the Act mandates that charges for medical care, services, and supplies shall not exceed one hundred and ten percent of fees prescribed in the Medicare Resource Based Relative Value Scale system as prepared by the United States Department of Health and Human Services (Medicare Fee Schedule)."

Hawaii Revised Statutes, §452-1, defines "Massage", "massage therapy", and "Hawaiian massage" as follows:

> "Massage", "massage therapy", and "Hawaiian massage" commonly known as lomilomi, means any method of treatment of the superficial soft

parts of the body, consisted of rubbing, stroking, tapotement, pressing, shaking, or kneading with the hands, feet, elbow, or arms, and whether or not aided by any mechanical or electrical apparatus, appliance, or supplementary aids such as rubbing alcohol, liniments, antiseptics, oils, powder, creams, lotions, ointments, or other similar preparations commonly used in this practice. Any mechanical or electrical apparatus used as described in this chapter shall be approved by the United States Food and Drub Administration.

The Physical Therapy Practice Act, under *H.R.S.* §461J-1 defines "physical therapy" or "physical therapy services" as follows:

> "Physical therapy" or "physical therapy services" means the examination, treatment, and instruction of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction, pain from injury, disease, and any other physical or mental condition as performed by a physical therapist appropriately licenses under this chapter. It includes but is not limited to:
>
> (1) Administration, evaluation, modification of treatment, and instruction involving the use of physical measures, activities, and devices, for preventive and therapeutic purposes; provided that should the care or treatment given by the physical therapist contravene treatment diagnosed or prescribed by a medical doctor, osteopath, or as determined by the board, the physical therapist shall confer with the

professional regarding the manner or course of treatment in conflict and take appropriate action in the best interest of the patient; and

(2) The provision of consultative, educational, and other advisory services for the purpose of reducing the incidence and severity of physical disability, bodily malfunction, or pain.

In this case, physical therapy in the form of hot or cold pack therapy, ultrasound therapy, and therapeutic exercises as well as myofascial release was performed by persons who were, at all times relevant, not licensed to perform physical therapy. Dr. Jou was aware of the fact that the therapists performing the services were licensed massage therapists, but not licensed physical therapists. Nevertheless, he billed the services using physical therapy codes. AIG properly did not pay for the services for hot or cold pack therapy, ultrasound therapy and therapeutic exercises as the services were not within the scope of the providers' specialty. AIG correctly paid the myofascial release at the massage therapy rate, thus, maximizing the amount paid for the service. The Provider did not meet his burden of proof that any of the physical therapy services are payable when performed by persons not licensed to provide physical therapy.

The evidence presented established that the office visit that was provided by Dr. Jou on August 7, 1996, was improperly coded by Dr. Jou using code 99205. AIG properly coded the service at 99204, which better reflected the level of service provided. The Provider did not meet his burden of proof that code 99205 was the correct code for the procedure.

As for the State Tax which was billed by Provider and not allowed by AIG, the evidence supports a determination that tax is already including in the Medicare Fee Schedule and by billing it, Provider has double billed AIG. AIG properly did not pay the additional taxes billed. The Provider did not meet his burden of proof that such tax is owed.

III. RECOMMENDED ORDER

The Hearings Officer, based upon the above findings of fact and conclusions of law, recommends that the Commissioner find and conclude that **Provider failed to establish by a preponderance of the evidence that:** (1) AIG was required to pay for physical therapy provided by persons not licensed to perform physical therapy; (2) AIG was required to pay for myofascial release at a rate other than the massage therapy rate; (3) AIG was required to pay for an office visit provided on 8/7/96 at code 99205 rather that 99204; and that (4) AIG was required to pay for state taxes when they were already included in the Medicare Fee Schedule. The Hearings Officer recommends that each party bear their own attorney's fees and costs.

DATED: Honolulu, Hawaii, December 19, 2002.

"s/KATHARINE M. NOHR"
KATHARINE M. NOHR
Attorney for Respondent
AIG HAWAII INSURANCE CO.

INSURANCE DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII

In the Matter of the Request	)	MVI-2002-34-P
for Payment of EMERSON M.F.	)	
JOU, M.D., as Provider	)	
for Albert Watanabe,	)	
Provider,	)	
vs.	)	
AIG HAWAII INSRUANCE CO.,	)	Hearings Officer
Respondent.	)	Rodney A. Maile

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the following party at their last known address by depositing same in the United States mail, postage prepaid, on the date of filing.

STEPHEN SHAW, ESQ.
P.O. Box 2353
Honolulu, Hawaii 96804
Attorney for Provider
EMERSON M.F. JOU, M.D.

DATED: Honolulu, Hawaii, December 19, 2002.

"s/KATHARINE M. NOHR"
KATHARINE M. NOHR
Attorney for Respondent
AIG HAWAII INSURANCE CO.

FILED

2004 SEP 24 PM 3:48

EUGENEL SABADO

CLERK, APPELLATE COURTS

STATE OF HAWAII

NO. 24566

IN THE SUPREME COURT OF THE STATE OF HAWAI

AIG HAWAII INSURANCE COMPANY, INC.,
Plaintiff-Appellee,

vs.

EMERSON M.F. JOU, M.D., dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE and/or THE REHAB CLINIC,
Defendant-Appellant,

and

ROXANNE BERTLEMAN, STEPHENIE BURT, ROSALINDA CACAL (ALSO KNOWN AS ROSALIDA CADAL WHITE), JEFF CALLAHAN, JULIE DEBARI, FLOYD DIMALANTA, WARNICE HANAMAIKAI (ALSO KNOWN AS PUALA HANAMAIKAI), PATRIC HARLAN, VICTOR KOSAKA, SUSAN LOVINGER, PATRICIA MEDINA, WEILING ZHENG, JOHN DOES 1-20 AND DOE PARTNERSHIPS, CORPORATIONS, or OTHER ENTITIES 1-20,
Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-3416)

ORDER DENYING MOTION FOR RECONSIDERATION,
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

The motion for reconsideration filed on September 3, 2004 by the Defendant-Appellant Emerson M.F. Jou, M.D, dba Comprehensive Clinic of Rehabilitation Medicine and/or the Rehab Clinic, requesting that this court review its summary disposition order, filed on August 24, 2004, is hereby denied.

DATED: Honolulu, Hawaii, September 24, 2004.

"s/C.J. Moon", "s/Steven Levinson"
"s/Paura A Nakayama", "s/Acoba"
"s/James Duffy"

Stephen M. Shaw
for defendant-appellant on
the motion

FILED

2004 AUG 24 AM 10:10

E.M. RIMANDO

CLERK, APPELLATE COURTS

STATE OF HAWAII

* * * NOT FOR PUBLICATION * * *

NO. 24566

IN THE SUPREME COURT OF THE STATE OF HAWAI

AIG HAWAII INSURANCE COMPANY, INC.,
Plaintiff-Appellee,

vs.

EMERSON M.F. JOU, M.D., dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE and/or THE REHAB CLINIC,
Defendant-Appellant,

and

ROXANNE BERTLEMAN, STEPHENIE BURT, ROSALINDA CACAL (ALSO KNOWN AS ROSALIDA CADAL WHITE), JEFF CALLAHAN, JULIE DEBARI, FLOYD DIMALANTA, WARNICE HANAMAIKAI (ALSO KNOWN AS PUALA HANAMAIKAI), PATRIC HARLAN, VICTOR KOSAKA, SUSAN LOVINGER, PATRICIA MEDINA, WEILING ZHENG, JOHN DOES 1-20 AND DOE PARTNERSHIPS, CORPORATIONS, or

OTHER ENTITIES 1-20,
Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-3416)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Defendant-appellant Emerson M.F. Jou, dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic (Dr. Jou) appeals from the September 12, 2001 final judgment of the First Circuit Court in this declaratory judgment action.[1] The circuit court granted AIG Hawaii Insurance Company, Inc. (AIG's) motion for summary judgment and entered a final judgment which precluded Dr. Jou from "(1) employing and utilizing massage therapists to perform the work of physical therapists without proper licensure, and (2).[ ] improperly bill[ing] Plaintiff AIG [ ] for said services." Dr. Jou contends that the circuit court erred by: (1) ruling that massage therapists employed by a physician cannot bill using codes for physical therapists; (2) ruling that Hawaii's physical therapist or massage therapist licensure or regulation limits payments by AIG for physical therapy services to persons licensed as physical therapists; (3) ruling that Hawaii Revised Statutes (HRS) § 436B-26 (1993) does not allow physicians or the licensed massage therapists they employ from recovering for the same massage therapy services provided by physical therapists; (4) ruling that neither Dr. Jou nor the licensed massage therapists are

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[1] The Honorable Gary Chang presided over the matter

practicing physical therapy, as defined by HRS § 461J-1 (1993), when they performed massage therapy and used physical therapist payment codes; and (5) violating Dr. Jou's federal and state constitutional rights to due process of law and equal protection.

Upon carefully reviewing the record and the briefs submitted, we hold as follows: (1) Dr. Jou improperly billed AIG for physical therapy services which were provided by massage therapists employed by him who were not licensed as physical therapists; consequently, AIG does not have a duty to compensate Dr. Jou for such unlicensed activity, see HRS § 436B-26; HRS § 452-1 (1993); HRS § 461J-1; and HRS § 453-1 (1993); and

(2) Dr. Jou did not raise his constitutional arguments before,. The circuit court, such that these arguments are deemed waived on appeal. Bitney v. Honolulu.kolice Dept., 96 Hawaii 243, 251, 30 P.3d 257, 265 (2001); Hill v. Inouve, 90. Hawai'i 76, 82, 976 P.2d 390, 396(1998). Furthermore, assuming arauendo that the constitutional issues were not waived, this court would disregard the claim because Dr.Jou failed to present a discernable argument beyond stating that there was a violation of his rights, State v. Bui, 104 Hawai'i 462, 464 n.2, 92 P.3d 471, 473 n.2 (2004); State v. Moore, 82 Hawai'i 202, 206 n.1, 921 P.2d 122, 126 n.1 (1996); State v. Jackson, 81 Hawaii 39, 46, 912 P.2d 71, 78 (1996). Therefore,

IT IS HEREBY ORDERED that the circuit court's September 12, 2001 final judgment is affirmed.

DATED: Honolulu, Hawaii, August 24, 2004.

"s/C.J. Moon", "s/Steven Levinson"

"s/Paura A Nakayama",
"s/Acoba" "s/James Duffy"

On the briefs:

Stephen M. Shaw
for defendant-appellant

David J. Minkin
and Pual B.K. Wong
(of McCorriston Miller
Mukai MacKinnon LLP)
For plaintiff-appellee

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
2001 SEP 12 PM 4:13
R. HIGA
CLERK

STEPHEN M. SHAW 4336
P.O. Box 2353
Honolulu, Hawaii 96804
(808) 521-0800

Attorney for Defendant/Cross-Complainant
EMERSON M.F. JOU, M.D.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

AIG HAWAII INSURANCE COMPANY INC., Plaintiff, vs.	) CIVIL NO. 99-3416-08 (GWBC)
EMERSON M.F. JOU, M.D., dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE and/or THE REHAB CLINIC, ROXANNE BERTLEMAN, STEPHENIE BURT, ROSALINDA CACAL (ALSO KNOWN AS ROSALIDA CACAL WHITE), JEFF CALLAHAN, JULIE DEBARI, FLOYD DIMALANTA, WARNICE HANAMAIKAI (ALSO KNOWN AS PUALA HANAMAIKAI), PATRICIA HARLAN, VICTOR KOSAKA, SUSANLOVINGER,	) FINAL JUDGMENT

PATRICIA MEDINA, WEILING ZHENG,)
JOHN DOES 1-20 AND DOE)
PARTNERSHIPS, CORPORATIONS, or)
OTHER ENTITIES 1-20,)
)
Defendants.)
AND RELATED COUNTERCLAIM.)

FINAL JUDGMENT

On June 27, 2001, this Court entered its Order Granting Plaintiff AIG Hawaii Insurance Company, Inc.'s Motion for Summary Judgment Against Defendant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic, filed June 8, 2001.

On June 27, 2001, this Court entered its Order Denying defendant Emerson M.F. Jou, M.D.'s Motion for Summary Judgment, or in the Alternative, for Summary Adjudication of Issues, filed June 8, 2001.

Pursuant to Rule 54(b) and 58 of the Federal Rules of Civil Procedure, there being no just reason for delay:

The claims for which this Final Judgment is entered are: all claims asserted against defendants by Plaintiff AIG HAWAII INSURANCE COMPANY, and all counterclaims asserted by Defendants against AIG HAWAII INSURANCE COMPANY. This is a final Judgment as to all claims, and the Judgment concludes all claims between the parties. There are no further claims or parties; and all other claims, counterclaims and cross-claims are dismissed.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Final Judgment is entered in favor of Plaintiff AIG HAWAII INSURANCE COMPANY, INC. and against Defendant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic and all other Defendants named herein, precluding and preventing Defendant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic from: (1) employing and utilizing massage therapists to perform the work of physical therapists without proper licensure, and (2) to improperly bill Plaintiff AIG Hawaii Insurance Company, Inc. for said services.

DATED: Honolulu, Hawaii, 9/12/01.

"s/Gary W.B. Chang"
JUDGE OF THE ABOVE-ENTITLED COURT

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
2001 JUL 26 PM 1:32
H. CHING
CLERK

McCORRISTON MILLER MUKAI MacKINNON LLP

DAVID J. MINKIN 3639-0
PAUL B.K. WONG 6014-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard Honolulu,
Hawaii 96813 Telephone: 529-7300

Attorneys for Plaintiff
AIG Hawaii Insurance Company, Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

AIG HAWAII INSURANCE COMPANY INC., Plaintiff, vs.	) CIVIL NO. 99-3416-08 (GWBC) (Declaratory Relief)
EMERSON M.F. JOU, M.D., dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE and/or THE REHAB CLINIC, ROXANNE BERTLEMAN, STEPHENIE BURT, ROSALINDA CACAL (ALSO KNOWN AS ROSALIDA CACAL WHITE), JEFF	)

CALLAHAN, JULIE DEBARI, FLOYD)
DIMALANTA, WARNICE HANAMAIKAI)
(ALSO KNOWN AS PUALA)
HANAMAIKAI), PATRICIA HARLAN,)
VICTOR KOSAKA, SUSANLOVINGER,)
PATRICIA MEDINA, WEILING ZHENG,)
JOHN DOES 1-20 AND DOE)
PARTNERSHIPS, CORPORATIONS, or)
OTHER ENTITIES 1-20,)
)
Defendants.)

ORDER GRANTING PLAINTIFF AIG HAWAII INSURANCE COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT EMERSON M.F. JOU, M.D., DBA COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE AND/OR THE REHAB CLINIC. FILED JUNE 8. 2001

Plaintiff AIG HAWAII INSURANCE COMPANY, INC.'S Motion for Summary Judgment Against Defendant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic, filed June 8, 2001, having been heard by the Honorable Gary W.B. Chang, in his courtroom, on June 27, 2001, at 9:30 a.m., with David J. Minkin, Esq. appearing for Plaintiff MG Hawaii Insurance Company, Inc. and Stephen Shaw, Esq. appearing for Defendant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic, and no other party appearing; and the Court having considered the motion, memoranda, declarations, argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs motion is GRANTED.

DATED: Honolulu, Hawaii, JUL 24, 2001.

"s/Gary W.B. Chang"
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

STEPHEN M. SHAW

Attorney for Defendant
EMERSON M.F. JOU, M.D. dba
COMPREHENSIVE CLINIC OF
REHABILITATION MEDICINE
and/or THE REHAB CLINIC

AIG HAWAII INSURANCE COMPANY, INC. v. EMERSON M.F. JOU, M.D., et al.; CIVIL NO. 99-3416-08 (GWBC);

ORDER GRANTING PLAINTIFF MG HAWAII INSURANCE COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT EMERSON M.F. JOU, M.D., DBA COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE AND/OR THE REHAB CLINIC. FILED JUNE 8. 2001

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
2001 JUL 26 PM 1:32
H. CHING
CLERK

McCORRISTON MILLER MUKAI MacKINNON LLP

DAVID J. MINKIN 3639-0
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Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard Honolulu,
Hawaii 96813 Telephone: 529-7300

Attorneys for Plaintiff
AIG Hawaii Insurance Company, Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

AIG HAWAII INSURANCE COMPANY INC., Plaintiff, vs.	) CIVIL NO. 99-3416-08 (GWBC) (Declaratory Relief)
EMERSON M.F. JOU, M.D., dba COMPREHENSIVE CLINIC OF REHABILITATION MEDICINE and/or THE REHAB CLINIC, ROXANNE BERTLEMAN, STEPHENIE BURT, ROSALINDA CACAL (ALSO KNOWN AS ROSALIDA CACAL WHITE), JEFF CALLAHAN, JULIE DEBARI, FLOYD DIMALANTA, WARNICE HANAMAIKAI)	)

(ALSO KNOWN AS PUALA)
HANAMAIKAI), PATRICIA HARLAN,)
VICTOR KOSAKA, SUSANLOVINGER,)
PATRICIA MEDINA, WEILING ZHENG,)
JOHN DOES 1-20 AND DOE)
PARTNERSHIPS, CORPORATIONS, or)
OTHER ENTITIES 1-20,)
)
Defendants.)

ORDER DENYING DEFENDANT EMERSON M.F. JOU, M.D.'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES, FILED JUNE 8, 2001

Defendant EMERSON M.F. JOU, M.D.'s Motion for Summary Judgment, or in the Alternative, for Summary Adjudication of Issues, filed June 8, 2001, having been heard by the Honorable Gary W.B. Chang, in his courtroom, on June 27, 2001, at 9:30 a.m., with David J. Minkin, Esq. appearing for Plaintiff AIG Hawaii Insurance Company, Inc. and Stephen M. Shaw, Esq. appearing for Defendant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine and/or The Rehab Clinic, and no other party appearing; and the Court having considered the motion, memoranda, declarations, argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's motion is DENIED.

DATED: Honolulu, Hawaii, JUL 24, 2001.

"s/Gary W.B. Chang"
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

_____

STEPHEN M. SHAW

Attorney for Defendant
EMERSON M.F. JOU, M.D. dba
COMPREHENSIVE CLINIC OF
REHABILITATION MEDICINE
and/or THE REHAB CLINIC

AIG HAWAII INSURANCE COMPANY, INC. v. EMERSON M.F. JOU, M.D., et al.; CIVIL NO. 99-3416-08 (GWBC); ORDER DENYING DEFENDANT EMERSON M.F. JOU, M.D.'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES, FILED JUNE 8, 2001

FILED

2006 JUN 13 PM 1:56

K.HAMAKADO

CLERK, APPELLATE COURTS

STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant-Appellant,

vs.

J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii Appellee-Appellee,

and

AIG HAWAII INSURANCE CO., Respondent-Appellee-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2106)

ORDER DENYING MOTION FOR RECONSIDERATION

(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.; and Acoba, J., Dissenting)

The motion for reconsideration filed on May 30, 2006 by provider-appellant-appellant, Emerson M.F. Jou, M.D., requesting that this court review its summary disposition order, filed on May 18, 2006, is hereby denied.

DATED: Honolulu, Hawaii, June 13, 2006.

"s/C.J. Moon", "s/Steven Levinson"
"s/Paura A Nakayama", "s/James Duffy"

Stephen M. Shaw
for provider-appellant-appellant
Emerson M.F. Jou, M. D.
On the motion

DISSENT BY ACOBA, J.

Based on my concurring and dissenting opinion filed herein, I would grant reconsideration on the issue of frivolousness.

"s/Acoba, J."

FILED
2006 JUN 30 PM 3:18
NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) 03-1-2106
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

NOTICE AND JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

MARK J. BENNETT 2672
Attorney General Of Hawaii

DAVID A. WEBBER 5161
DEBORAH DAY EMERSON 3668
Deputy Attorney General
425 Queen Street
Honolulu, HI 96813

Telephone: (808) 586-1180

Attorney for Appellee-Appellee J. P. Schmidt,
Insurance Commissioner, Department of Commerce
And Consumer Affairs, State of Hawaii

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner,	)
Department of Commerce and Consumer	)
Affairs, State of Hawaii,	)
	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

NOTICE AND JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the SUMMARY DISPOSITION ORDER of the Supreme Court, entered May 18, 2006, the final judgment, entered by the Circuit Court of the First Circuit on September 9, 2004, is AFFIRMED.

DATED: Honolulu, Hawaii, JUN 30, 2006.

BY THE COURT

"s/Norma Yara"
Clerk

APPROVED:

"s/James E. Duffy, Jr."
Justice

No. 26877
JOU V. SCHMIDT, ET AL.,
First Circuit Civil No. 03-1-2106,
NOTICE AND JUDGMENT ON APPEAL

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE AND JUDGMENT ON APPEAL was duly served on each of the following counsel at their respective listed addresses by placing the same in the United States mail, first class postage prepaid, on May 24, 2006.

Stephen M. Shaw, Esq.
P O Box 2353
Honolulu, HI 96804

Katherine Nohr, Esq.
Miyagi, Nohr & Myhre
1200 Pauahi Tower
1001 Bishop Street,
Honolulu, HI 96813

DATED: Honolulu, Hawaii, May 24, 2006.

"s/David A. Webber"
David A. Webber
Deputy Attorney General

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
Provider-Appellant-Appellant,	) **03-1-2106**
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

CERTIFICATE OF SERVICE RE: NOTICE AND JUDGMENT ON APPEAL

I HEREBY CERTIFY that a copy of the NOTICE AND JUDGMENT ON APPEAL, filed June 30, 2006, was duly served on each of the following counsel at their respective listed addresses by placing the same in the United States mail, first class postage prepaid, on July 3, 2006.

Stephen M. Shaw, Esq.
P O Box 2353
Honolulu, HI 96804

Katherine Nohr, Esq.
Miyagi, Nohr & Myhre
1200 Pauahi Tower
1001 Bishop Street,
Honolulu, HI 96813

DATED: Honolulu, Hawaii, May 24, 2006.

"s/David A. Webber"

DAVID A. WEBBER, Deputy Attorney General

Attorneys for Appellee-Appellee J.P. Schmidt, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii

FILED
2006 JUL 10 PM 12:00
NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant-Appellant,

vs.

J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii Appellee-Appellee,

and

AIG HAWAII INSURANCE CO., Respondent-Appellee-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2106)

JUDGMENT FOR FEES AND COSTS

In consideration of this court's July 10, 2006 order granting in part and denying in part requests for fees and costs to respondent-appellee-appellee AIG Hawaii Insurance Co. (AIG), and appellee-appellee Insurance Commissioner J.P. Schmidt, Department of Commerce and Consumer

Affairs, State of Hawai'i, from provider-appellant-appellant Emerson M.F. Jou, M.D.,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment is entered as follows:

(1) In favor of appellee-appellee Insurance Commissioner J.P. Schmidt, Department of Commerce and Consumer Affairs, State of Hawai'i, and against provider-appellantappellant Emerson M.F. Jou, M.D. in the amount of $2,536.00, with interest thereon as provided by law; and

(2) In favor of respondent-appellee-appellee AIG Hawaii Insurance Co. and against provider-appellant-appellant Emerson M.F. Jou, M.D. in the amount of $2,804.62, with interest thereon as provided by law.

DATED: Honolulu, Hawaii, July 10, 2006.

BY THE COURT

_____

Clerk

APPROVED:

"s/James E. Duffy, Jr."

Justice

EMERSON M.F. JOU, M.D.,Provider-Appellant-Appellant, vs. J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii, Appellee-Appellee, and AIG HAWAII INSURANCE CO., Respondent-Appellee-Appellee.

NO. 26877

SUPREME COURT OF HAWAII

110 Haw. 418; 133 P.3d 1210; 2006 Haw. LEXIS 260

May 18, 2006, Decided

SUBSEQUENT HISTORY: Reconsideration denied by Jou v. Schmidt, 2006 Haw. LEXIS 314 (Haw., June 13, 2006)

PRIOR HISTORY: [*1] APPEAL FROM THE FIRST CIRCUIT COURT. CIV. NO. 03-1-2106
AIG Haw. Ins. Co. v. Jou, 2004 Haw. LEXIS 559 (Haw., Aug. 24, 2004)

OPINION: Affirmed.

* RULES CURRENT THROUGH MAY 1, 2006 *
* ANNOTATIONS CURRENT THROUGH MARCH 10, 2006*

Hawai'i Rules of Appellate Procedure Adopted and promulgated by The Supreme Court of the State of Hawai'i. Effective June 1, 1984 As amended

HRAP Rule 28 (2006)

Review Court Orders which May amend the Rule.

Rule 28. Briefs.

(a) Format, service, and page limitation. All briefs shall conform with Rule 32 and be accompanied by proof of service of two copies on each party to the appeal. Except after leave granted, an opening or answering brief shall not exceed 35 pages, and a reply brief shall not exceed 10 pages, exclusive of indexes, appendices, and statements of related cases. If a brief raises ineffective assistance of counsel as a point of error, the appellant shall serve a copy of the brief on the attorney alleged to have been ineffective.

(b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

(1) A subject index of the matter in the brief with page references and a table of authorities listing the cases, alphabetically arranged, text books, articles, statutes, treatises, regulations, and rules cited, with references to the pages in the brief where they are cited. Citation to Hawai'i cases

since statehood shall include both the state and regional reporters. Citation to foreign cases may be to only the regional reporters. Where cases are generally available only *from* electronic databases, citation may be made thereto, provided that the citation contains enough information to identify the database, the court, and the date of the opinion.

(2) (Reserved)

(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. Record references shall include page citations and the volume number, if applicable. References to transcripts shall include the date of the transcript, the specific page or pages referred to, and the volume number, if applicable. Lengthy quotations from the record may be reproduced in the appendix. There shall be appended to the brief a copy of the judgment, decree, findings of fact and conclusions of law, order, opinion or decision relevant to any point on appeal, unless otherwise ordered by the court.

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged

error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

(5) A brief, separate section, entitled "Standard of Review," setting forth the standard or standards to be applied in reviewing the respective judgments, decrees, orders or decisions of the court or agency alleged to be erroneous and identifying the point of error to which it applies.

(6) (Reserved)

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

(8) Relevant parts of the constitutional provisions, statutes, ordinances, treaties, regulations, or rules pertaining to the points of error set out verbatim, unless otherwise provided in the brief. If lengthy, they may be cited and their pertinent text set out in the appendix.

(9) A conclusion, specifying with particularity the relief sought.

(10) An appendix. Anything that is not part of the record shall not be appended to the brief, except as provided in this rule.

(11) Statement of Related Cases. A brief statement identifying any related case known to be pending in the Hawai'i courts or agencies. The statement shall include the following: case caption, docket number, and the nature of the relationship. Cases are deemed related if they:

(A) arise out of the same or consolidated cases in the court or agency;

(B) involve a case that was previously heard by the Hawai'i appellate courts;

(C) involve the same parties;

(D) involve the same or closely related issues;

(E) involve the same basic transaction or event; or

(F) have any other similarities of which the appellate courts should be aware.

The statement shall be presented on a separate page, entitled "Statement of Related Cases." The statement shall be the last page in the brief following the appendices, if any. If no other cases are deemed related, a single statement to this effect shall be provided. If appellant identifies a case as related, no other party need duplicate the listing in that party's brief. If appellant learns of a related case after filing the initial brief, appellant shall promptly file a statement.

(c) Answering brief. Within 40 days after service of appellant's opening brief, or receipt as evidenced by an acknowledgment of service as provided in Rule 25, whichever is later, the appellee shall file an answering brief. The brief shall be of like character as that required for an opening brief except that no statement of points shall be required, and no other section is required unless the section presented in the opening brief is controverted. If, after filing the answering brief, appellee learns of a related case that has not been previously identified by any other party, appellee shall promptly file a statement of related cases that conforms with subsection (b)(11) of this rule.

A nominal appellee need not file an answering brief. The appellate court may require an answering brief if one is deemed useful to its consideration.

(d) Reply brief. Within 14 days after service of appellee's answering brief, or receipt as evidenced by an acknowledgment of service as provided in Rule 25(e), whichever is later, the appellant may file a reply brief. The reply brief shall be confined to matters presented in the answering brief. If no reply brief is to be filed, the appellant shall notify the appellate clerk and the appellee in writing of that decision prior to the expiration of the time for filing the reply brief.

(e) Briefs on reserved questions. In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purpose of this rule, be regarded as the appellant and the party opposing the question as the appellee. So also where there are several questions and one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some and the negative as to others, the plaintiff shall be regarded as the appellant and the defendant as the appellee, unless, upon application to the appellate court, an order specifying otherwise is issued by the appellate court. Unless otherwise ordered by the appellate court, briefs by the parties shall conform to Rule 28(a), (b), (c) and (d) except that points of error and standards of review need not be provided.

(f) Briefs in original cases. Unless otherwise ordered by the appellate court, Rule 28(a), (b), (c) and (d) shall apply to cases brought originally in the

Hawai'i Supreme Court, except that points of error and standards of review need not be provided. For purposes of this rule, when a case is brought originally in the supreme court, the party who would be regarded as the plaintiff or petitioner, if the matter were instituted in a trial court, shall be regarded as the appellant, and the opposing party as the appellee.

(g) Brief of amicus curiae. An amicus curiae brief may be filed only by leave of the appellate court. The order granting leave shall fix the time for filing the amicus curiae brief and any response thereto. The appellate court may allow or disallow the filing of such brief with or without a hearing. All amicus curiae briefs shall comply with the applicable provisions of subsection (b) of this rule. The attorney general may file an amicus curiae brief without order of the court in all cases where the constitutionality of any statute of the State of Hawai'i is drawn into question, provided that the attorney general shall file the brief within 30 days after the filing of the answering brief, or within 30 days after notice was received pursuant to Rule 44, whichever period last expires.

(h) Briefs on cross appeal. If there is a cross appeal, separate opening and answering briefs on the cross appeal, and any reply brief relating thereto, shall be filed in addition to the briefs on the primary appeal and shall comply with the applicable requirements of Rule 28(a), (b), (c) and (d).

(i) Reserved.

(j) Citation of supplemental authorities. Parties

may, by letter to the appellate clerk bring to the appellate court's attention pertinent and significant authorities published after a party's brief has been filed, but before a decision. A copy of the letter, setting forth the citations, shall be served at or before the time of filing as provided by Rule 25(b) of these rules. The letter shall provide references to either the page(s) of the brief or to a point argued orally to which the citations pertain. The letter shall, without argument, state the reasons for the supplemental citations. The parties shall provide the court with seven copies unless the case is assigned to the intermediate court of appeals in which case five copies shall be provided. Any response shall be made promptly and shall be similarly limited.

HISTORY: Amended February 20, 1985, effective February 20, 1985; further amended January 22, 1987, effective January 22, 1987; further amended November 10, 1993, effective December 15, 1993; further amended April 5, 1994, effective April 15, 1994; further amended June 23, 1994, effective June 23, 1994; further amended effective October 19, 1994, further amended August 14, 1995, effective October 16, 1995; further amended September 7, 1995, effective October 30, 1995; further amended December 6, 1999, effective January 1, 2000; further amended October 6, 2003, effective January 1, 2004.

FILED
2006 JUN 13 AM 11:12
K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) 03-1-2106
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

PROVIDER-APPELLANT-APPELLANT EMERSON M.F. JOU, M.D.'S OPPOSITION TO RESPONDENT-APPELLEE AIG HAWAII INSURANCE COMPANY'S REQUEST FOR ATTORNEY'S FEES AND COSTS

DECLARATION OF COUNSEL

EXHIBITS 1 - 58

PROOF OF SERVICE

STEPHEN M. SHAW #4336
P.O. Box 2353
Honolulu, Hawaii 96804
Tel: (808) 521-0800

Attorney for Provider-Appellant-Appellant
EMERSON M.F. JOU, M.D.

[Pages 6 - 11 of the original document]

The 1.3 hours to draft "additional argument" is both excessive and insufficiently detailed. DFS at 228 n.2 and n.3, 131 P3d 511 n2 and n3. The same is true for 0.7 hour spent on "editing" an Ans.Br. 14 pages long, where most of the first five pages were dragged from a circuit court document. Ans.Br. 1-5; compare Ex 4 – 8 with Ex 22 -25.

G. 3-18-05 Tasks Should Be Disallowed

The description, "review", in this context, is not sufficiently detailed to support a fee award against another party. DFS at 228 n2, and n3 131 P3d 511 n2 and n3. The reply brief was only six pages long, exclusive of exhibits. If a review meant reading then this would take a maximum of only 0.1.

H. 5-19-06 Tasks Should Be Disallowed

Based on the same objections to the 3-18-05 entry, the amount of time spent reviewing this Court's order appears excessive .

II. DAMAGES AND COSTS SHOULD NOT BE IMPOSED ON THIS RECORD

1. Sua Sponte Damages Order Is Improper, In Violation Of The Due Process Clauses Of HI CONST Art I Section 5, US CONST. 5th And 14th Amdt

For sanctions under HRAP 38 it must be found after adequate prior notice and a reasonable opportunity to be heard that there was (1) bad faith, and (2) that the appeal was manifestly and palpably, without merit. This Court's SDO at 6 based this proposition on Rhoads v. Okamura, 98 Haw. 407, 414, 49 P3d 373, 380 (2002) (overruled on other grounds Alford v. C&C, 109 Haw 14, 144 P3d 809 (2005)), where a tax protester asserted inter alia that Hawaii is not a state. 98 Haw at 412, 413, 49 P3d at 378, 379.

The other case underlying the Court's sua sponte damages award was Gold v. Harrison, 88 haw 94, 107, 962 P2d 353, 366 (1998) ("We noted that where the circuit court ruled that a lawsuit was frivolous, it follows logically that the subsequent appeal was also frivolous"). On appeal, this Court noted that the appellants in Gold refused to acknowledge controlling authority brought to their attention on numerous occasions." 88 Haw. at 107. Emphasis added.

In imposing the damages (here, sua sponte) this Court relied on SDO 6, 7 on Abastillas v. Kekona, 87 Haw. 446, 449, 958 P.2d 1136, 1139 (1998). Unlike the case at Bench however, and in line with Gold, this Court was faced in Abastillas with this scenario: "It is unnecessary for us to determine, de novo whether Abastilla's lawsuit was frivolous. The circuit court so

ruled and the ruling was affirmed by the ICA in its summary disposition order. Inasmuch as the lawsuit was frivolous it follows logically that the subsequent appeal was also frivolous." Unlike Abstilla, this Court is making a sua sponte determination of frivolousness, without the benefit of a lower court's full hearing necessary to that finding. This contradicts Abastilla (87 Haw at 448), and is without reference to the record.

At Bench, there was no oral argument, no notice at all, and very sparse authority for sua sponte HRAP 38 damages on appeal, other than the foregoing cases. HRAP 38 itself does not provide the authority for this order:

"Rule 38. Damages and costs for frivolous appeals.

> If a Hawaii appellate court determines that an appeal decided by it was frivolous, it may, after a separately filed motion or notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee. (Amended December 6, 1999, effective January 1, 2000)." Emphasis added.

In applying the bad faith standard from Rhoads, it should also be recognized that "the mere fact that an appeal is frivolous does not of itself establish bad faith. To establish bad faith on this record, a hearing was required to determine if the appeal was taken solely [for purposes of delay]" United States v. Blodgett, 709 F2d 608, 610 (9th Cir 1983). Likewise, more was required here to support a finding of bad faith or frivolousness grounded solely on issue preclusion.

This Court's SDO at 5 ¶(4) relies on the Court's inherent power to decide HRAP 38 damages. Like circuit courts, the appellate courts' inherent powers, however, must "be exercised with restraint and discretion". Bank of Hawaii v. Kunimoto, 91 Haw 372, 387, 984 P2d 1198, 1213 (1999) (citing Roadway Express Inc. v. Piper, 447 U.S. 352, 764, 100 S.Ct 2455 (1980).

HRAP 38 is very similar to the federal counterpart, which provides:

> **"Rule 38. Frivolous Appeal-Damages and Costs**
>
> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. (As amended Apr. 29, 1994; Apr. 24, 1998, eff. Dec. 1, 1998)."

The commentary to the federal rule is persuasive and instructive here:

> **"1994 Amendments**
>
> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A

statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the Court's discretion." Emphasis added.

From the information provided by this Court's SDO at page 4(2), no careful response could have been made, even if the Court had provided notice. Notice would not, even if given, have adequately informed Appellant of the grounds upon which the costs or damages sanction was based, so that he could fashion a response. It is for this reason that adequate prior notice must precede the imposition of sanctions. A sua sponte damage award itself does not substitute for notice, particularly adequate notice. "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. Wong v. Frank, 9 Haw.App. 249, 261, 833 P.2d 85, 92 (App 1992); Roadway Express, supra 447 U.S. at 764.

In the analogous context of HRCP 11 sanctions, this Court has cautioned: "However, sanctions are not to be assessed without full and fair consideration by the court". Enos v. Pacific Transfer etc, 79 Haw 452, 458, 903 P.2d 1273, 1279 (citing Roadway Express, supra).

Full and fair consideration by this court, in the exercise of its inherent powers, would have started with,

in this Court's own words, the "procedural due process right of adequate prior notice and a reasonable opportunity to be heard." Wong v. Frank, supra, 9 Haw.App at 261, 262, 833 P2d at 92. Emphasis added. In that case, this Court decided that if the trial judge was sanctioning an attorney under the circuit court's inherent powers, that the judge violated the attorney's procedural due process rights of adequate prior notice and a reasonable opportunity to be heard. 9 Haw.App 249, 833 P2d 85.

In Wong, the circuit court sanctioned an attorney $500, for repeated tardiness in court appearances. The colloquy, this Court noted, produced a transcript of "but two typewritten letter-sized sheets." 9 Haw.App at 261 n6, 833 P.2d 92. At Bench, the factual basis for the finding of bad faith (SDO 5 ¶(4)) was much shorter, and did not include Wong's rudiments of a hearing, factual exchange, or specification of grounds, based on the record.

2. Damages Based On Issue Preclusion Are Not Supported By The Record

a. Introduction

This Court found Appellant's case here was one of "relitigating the issue of whether an insurer is obligated to reimburse a licensed physician/medical provider for physical therapy services provided by third parties not licensed as physical therapists or physicians but acting under the physician/ provider's supervision." SDO 4¶(2).

On May 30, 2006, Appellant moved this Court for reconsideration because this broad charge

overlooked contrary matters of record and intervening changes in the legal landscape. Appellant incorporates that motion.

Based on the allegation that Appellant was relitigating the foregoing issue, this Court found this appeal frivolous and that it demonstrated a bad faith refusal to acknowledge controlling authority. SDO 5¶(4). Frivolousness of this appeal was found sua sponte because, according to this Court. "it was filed ... despite the lack of any material change in the facts, law or arguments advanced ... only six weeks after this Court rejected the same arguments ..." Emphasis added.

[End Page 11 of the original document]

FILED
2006 MAY 30 PM 2:33
E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

PROVIDER-APPELLANT-APPELLANT EMERSON M.F. JOU, M.D.'S MOTION FOR RECONSIDERATION

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF COUNSEL; EXHIBITS "1" – "53"

DECLARATION OF ROBIN LINKER; EXHIBIT "A"

PROOF OF SERVICE

STEPHEN M. SHAW #4336
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Attorney for Provider-Appellant-Appellant
EMERSON M.F. JOU, M.D.

[Page 2 of the original document]

(b) New Determination Needed To Avoid Inequitable Administrative
Of The Law. Points 3, 5 (argument).

2. Constitutional Claims Were Not Waived And Were Reserved. Point 6 (argument).

3. Transcript Filed Late Should Be Considered. Point 7 (argument).

4. The Court Overlooked Fact That Second Appeal was Based On A Good Faith Argument For The Extension, Modification Or Reversal Of Law And That The Second Appeal Was Not Manifestly And Palpably Without Merit So As To Indicate Bad Faith. Point 9 (argument).

5. SDO Would Violate Constitutional Guarantees Under The Due Process Clause And Equal Protection Clause OF The Fourteenth Amdt U.S. Constitution (Point 9, argument).

This Motion is made pursuant to HRAP 40, and is based on the record herein, the declarations served herewith.

DATED: Honolulu, Hawaii, May 30, 2006.

Respectfully Submitted,

"s/Stephen M. Shaw"
Stephen M. Shaw
Attorney for Provider-Appellant-Appellant
EMERSON M.F. JOU, M.D.

[End Page 2 of the original document]

[Page 16 of the original document]

prejudice from the mistake. The time lapse from the filing of the transcript to the SDO did not appear to be so short as to impact the Court's processes, and the transcript was only 21 pages long.

8. The Court Misapprehends Whether The Appeal Was Frivolous And Overlooked The Record Re Preclusion

As the declaration of Robin Linker, offered to rebut the Court's sua sponte claim of frivolousness, demonstrates, Appellant has a good faith argument for the modification or reversal of the rather private law. Further, at the time Appellant filed his NOA in the present case, he was waiting for the state massage

board to decide which procedures massage therapists were actually authorized to perform. This opinion, made about a month after the NOA was filed here, was favorable on two procedures, unfavorable on one; and a fourth was not covered by this informal opinion. Ex 19. As to the latter two procedures, AIG waived its objections. Ex 10, 11.

Additionally, the arguments made by Appellant in the briefs in the two cases are, contrary to the SDO, different; and the records those arguments refer to are also different. SDO 5¶(4), is incorrect.

9. SDO Violates Appellant's Federal Constitutional Rights

The constitutional implications of the SDO are grave. Appellant restates and incorporates his prior constitutional arguments raised in the agency, circuit court and incorporated into his opening brief. Additionally, uneven strict application of this Court's rules, a sua sponte frivolousness and damages finding, and reliance on an Appellee's argument not supported by the record or by citation to the record would, if upheld, violate the following provisions of the United States Constitution: Petition Clause, 1st Amdt; Equal Protection Clause, 5th and 14th Amdt; Takings Clause 5th Amdt. Finally, Appellant is entitled to the fair services of the state judiciary and he pays taxes for fair services.

This Court can judicially notice that health providers are leaving Hawaii because of problems with reimbursement from insurance companies. These problems are amplified by the lack of any remedies to get paid. While Dr. Jou's claims here, outside of the prior case's preclusive effect, seem small, so was the

tea tax that lies at the birth of this Country. See also Zanakis-Pico v. Cutter Dodge, 98 Haw. 309, 330, 47 P.3d 1222, 1243 (2002) ("claim for '$3.00 to $5.00-worth of gas' was clearly to compensate them for traveling to the Cutter Automobile lot").

This Court's disparate sua sponte penalties in the SDO, while accepting as true AIG's preclusion arguments with no record cites, implicates an actionable animus, ill will and an effort to "get" Dr. Jou. Village of Willowbrook et al v. Olech, 528 US 562, 120 S.Ct 1073 (2000).

CONCLUSION

The SDO and the record must be reconsidered and the SDO vacated.

DATED: Honolulu, Hawaii, May 30, 2006.

Respectfully Submitted,

"s/Stephen M. Shaw"
Stephen M. Shaw
Attorney for Provider-Appellant-Appellant
EMERSON M.F. JOU, M.D.

[End Page 17 of the original document]

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

DECLARATION OF COUNSEL

I, STEPHEN M. SHAW, counsel for Appellant, hereby declare the following:

1. This declaration based upon personal knowledge, the attached exhibits, and the business records that my office generates, keeps, and/or maintains in the regular course of business. The exhibits attached hereto are true and correct and are incorporated by reference.

2. This motion is presented in good faith and is not brought for purposes of delay.

3. Declarant's specific credentials supporting his expertise in the AMA Current Procedural Terminology ("CPT") include, as exhibit 33 more fully explains: Certified American Academy Of Professional

Coders. Declarant's certificate is active, and he has completed the required continuous education credits for 2005-2006.

4. As a direct result of AIG's distortions and obfuscation of medical bill coding in this and the prior case, and to better prepare for this case, I attended an 80 hour course at Kapiolani Community College and thereafter passed the national certification exam in the area of outpatient medical bill coding. A true and correct copy of my certification is attached at Exhibit 33.

5. Before filing this appeal, I determined that it was brought in good faith because Dr. Jou was being paid at that time by insurers at the physician's rate for procedures provided by licensed massage therapists employed by him, within a very narrow range of CPT codes.

6. Despite these customs and practices, I was going withdraw this appeal if the massage board issued a decision that licensed massage therapists are precluded from providing the procedures involved in this case. Ex. 19.

7. Since the state massage board's decision, as to two of the procedures was favorable (ex 19) and since office visits, disputed here (ex 12, 17), had nothing to do with the prior case, and since AIG eventually gave up any of its objections (ex 10, 11) which related to the earlier case, I determined that this case was winnable and worth processing. Proof that the appeal is not frivolous is also found at the attached declaration of Robin Linker.

8. None of the procedures employed here, in terms of the CPT code, are "physical therapy services",

as this Court thought in the SDO 4(2) (ex 4). Since the Hawaii Worker's Compensation Fee Schedule (HWCMFS) was drastically changed at year end 1995, that schedule is not applicable to the procedures employed here, and the new schedule did not confuse any of the services here with being "physical therapy services". SDO 4¶(2), ex 4. To better illustrate this point, excerpts of the HWCMFS are attached hereto at exhibits 34-48.

9. The previous appeal involved services for the years in this case, but also for services covered by the pre-1996 HWCMFS. Ex 34-48. Language in ex 35 ¶(last) is used by insurers to deny or lower physical reimbursement. This language was not carried forward to the fee schedules relevant here. Ex 39-48. That language and litigation thereon could be the only issue precluded by the SDO 4¶(2).

10. But the claims here, were not pre-1996 and have nothing to do with possible determinations allowed by the prior fee schedules. Declarant, like the Court, is left to guess where, in the record the five issues were previously decided (AIG Ans.Br. 8¶(last), 9), and where they are identically matched in any record. While the issues asserted by AIG differ from the issue framed by this Court, no issue to be precluded is anchored in this record, which shows many issues which could not be precluded at all.

11. An exhaustive review of the records in both cases and Declarant's files was presumably done by this Court. A similar review was performed by Declarant. But the legal burden was on AIG to identify the issues and to show they were identical. AIG's briefing violation caused extreme prejudice to the opposing party and further work for this Court. The lack of any support for

AIG's preclusion theory by the Commissioner's brief is unusual and telling.

12. These prejudicial failures by AIG, to shoulder the burden of any Hawaii litigant claiming issue preclusion, has unfairly put Appellant in the position of guessing what AIG meant; and, at the same time, investigating the record in both cases in their entirety.

13. As a result of this costly and time consuming review, Declarant now concludes that AIG committed serious fraud on this Court, and that the reasons AIG did not ground its assertion of res judicata or collateral estoppel on actual records of any tribunal is because its argument was frivolous and in bad faith.

14. At the time AIG identified five issues which it said could not be relitigated, AIG knew that this record showed nearly all of the issues here could not, by the wildest stretch, be concerned with the prior case. The only remarkable feature of the prior case was that AIG filed a judgment lien to ruin Dr. Jou's credit based not on a money judgment or injunction. It took AIG until this year to remove it.

15. Had AIG honestly and competently referred the assigned justice, who, declarant is informed, is the Honorable James Duffy, to the record, the Court may have still found a minor issue which could not be relitigated (SDO 4¶(2)); but it would also find that, with few exceptions, that all the issues here are not identical to the issue this Court wrote was presented in the first appeal. Id; also, ex 4.

16. The issue this Court concluded was already decided was grounded on "physical therapy services by

third parties". Id. Had AIG honestly cited the assigned justice to the record, the Court would have found extensive litigation over medical office visits in this case, and no similar issue in the prior case. None of these services were ever claimed to be physical therapy services. Compare ex 4¶(2) with AIG Ans.Br. 8¶(last), 9; and exhibit 12 (12-4-96 entry) and "explanation" at ex 13; also, ex 17 (8-7-96 entry) and "explanation at ex 18.

17. Had AIG followed the rules and shouldered its burden, it would have located other issues not remotely identical to the issues it framed at AIG Ans.Br. 8, 9; or even this Court's version at ex 4. These were the unexplained deductions at ex 10; that is, skimming small unexplained amounts from the health claims. Ex 11. Clearly, these non-objections were not based on "physical therapy services by third parties".

18. Additionally, the records AIG produced for trial in this case, unlike the previous case, showed affirmatively that AIG (here) waived any objections to alleged "physical therapy services by third parties". Ex 10 and Ex 11 voluntarily relinquished the prior objections to ultrasound therapy, myofascial release and therapeutic exercises.

19. Finally, had AIG cited to the record for its claim of issue preclusion/res judicata it would have had to admit that the party skimming the claims at Bench was not even the same company named in the earlier suit! This record shows that the responsible party here is AIG Claims Services Inc. and not AIG Hawaii Insurance Company. Exhibits 11 ¶(last), 13 (same), 15 (same), 16 (same) and 18 (same).

20. In light of the foregoing serious problems facing AIG had it tried to anchor its argument about

preclusion to the record, it appears that AIG misled the Court, causing injury to Appellant. To rebut the SDO's sua sponte charges of frivolousness, and to a lesser extent to better inform this Court how serious AIG's misrepresentation is, Declarant obtained an expert. Her declaration is aimed at this Court's sua sponte charge of frivolousness. This declaration of Robin Linker also shows that AIG falsely claimed an issue was precluded. Ans.Br.8. The expert's declaration points out that, even if AIG found support in the record for this unsupported assertion, its premise lacks support in medical science, or in the area of medical bill coding; that is, the first "issue" at AIG Ans.Br. 8¶(last) was designed to mislead this Court, and it did in fact mislead the Court.

21. Based upon declarant's CPT credentials, his experience in litigating the CPT for nearly six years, his background and education, declarant concludes that the CPT codes listed below for 1996 and 1997 are not, and never were, designed to be used solely by physical therapists. Ex 20-32. The term "therapist" in these codes was not intended by the drafters to only mean "physical" therapists. Had the drafters intended to impose the limitation they would have clearly stated it, and are more than competent to do so.

22. Further, declarant concludes that, with respect to the CPT codes listed below, nothing in the CPT for 1996, and 1997, prevented licensed massage therapists from performing the coded procedures listed below, when employed by, and when under the direction of a medical doctor, particularly a physiatrist. Ex 20-32.

23. The term "therapist" used in the following procedures in the CPT, based upon declarant's

experience, background and education, has been widely utilized by licensed massage therapists. Ex 10, 11. Moreover, the term "therapist" or "provider" in the CPT book, does not clarify specific licensures, particularly any exclusions of therapist types, in terms of the intent and language of the CPT to perform the following coded procedures. Ex 20-32.

24. The following are the disputed CPT codes from the 1996-97 version of the AMA's CPT. Ex 20-32 (excerpts). Unless otherwise indicated, there was no change from 1996 to 1997:

"Physical Medicine And Rehabilitation"

Modalities

Any physical agent applied to produce therapeutic changes to biologic tissue; includes but not limited to thermal, acoustic, light, mechanical, or electric energy.

Supervised

The application of a modality that does not require direct (one on one) patient contact by the provider.

97010 Application of a modality to one or more areas; hot or cold packs.

. . .

Constant Attendance

The application of a modality that requires direct (one on one) patient contact by the provider.

. . .

97035 ultrasound, each 15 minutes

. . .

Therapeutic Procedures

A manner of effecting change through the application of clinical skills and/or services that attempt to improve function.

Physician or therapist required to have direct (one on one) patient contact.

. . .

97110 Therapeutic procedure, one or more areas, each 15 minutes; therapeutic exercises to develop strength and endurance, range of motion and flexibility.

. . .

97250 Myofascial release /soft tissue mobilization one or more regions."

25. The CPT does not prohibit a medical doctor employing licensed massage therapists to provide the above procedures, and to bill payers for these services, at the physician's rate rather than the rate for "stand alone" or non-employee therapists. These are contract specific issues in which the CPT does not address.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, May 30, 2006.

"s/Stephen M. Shaw"

Stephen M. Shaw
Attorney for Provider-Appellant-Appellant
EMERSON M.F. JOU, M.D.

Of Counsel: MIYAGI, NOHR & MYHRE
KATHARINE M. NOHR 4828-0
1001 Bishop Street,
Pauahi Tower, Stuite 1200
Honolulu, HI 96813
Attorney for Respondent
AIG HAWAII INSURANCE CO.

INSURANCE DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII

In the Matter of the Request for Payment) MVI-2002
) -34-P
EMERSON M.F. JOU, M.D., as Provider)
For Albert Watanable,)
Provider,)
vs.)
AIG HAWAII INSURANCE CO.,)
Respondent)

AIG HAWAII INSURANCE COMPANY'S EXHIBIT LIST

EXHIBIT	DESCRIPTION	MARKED FOR ID	ADMITTED	WITH-DRAWN
A	No-Fault Benefits Recap Sheet			
B	Bill reviews			
C	Letter dated March 18, 1999 from Dr. Jou to the Insurance Division.			
D	Allan Gushiken letter dated November 9, 1998 to Dr. Jou.			

EXHIBIT 9

LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVEROR

MARK E. RECKTENWALD
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

BOARD OF MASSAGE THERAPY
STATE OF HAWAII
PROFESSIONAL AND VOCATIONAL LICENSING DMSION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P.O. BOX 3469
HONOLULU, HAWAII 98801
www. hawall.gov/doca/pvl

November 3, 2004

Mr. Stephen M. Shaw
P O Box 2353
Honolulu, Hawaii 96804

RE: Scope of Practice for Massage Therapy
Hot Packs, Ultrasound and Stretching Exercises

Dear Mr. Shaw:

At their October 27, 2004 meeting, the Board of Massage Therapy ("Board') reviewed your inquiry if a massage therapist may utilize hot packs, ultrasound and stretching exercises under the supervision of a physiatrist.

It was the Board's informal interpretation that massage therapists may utilize hot packs and stretching exercises, but not ultrasound.

This is an informal interpretation based solely on your written request and is for informational and explanatory purposes only and Is not an official opinion or decision and therefore is not to be viewed as binding on the Board.

If you have any questions, please feel free to call me at 586-2694.

Very truly yours,
"s/Lee Ann Teshima"
Executive Officer

LAT: sjb

EXHIBIT 19

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

DECLARATION OF ROBIN LINKER; EXHIBIT "A"

I, ROBIN LINKER, hereby declare the following:

1. I make this declaration based upon my personal knowledge, the attached curriculum vitae, and the business records that my office generates, keeps, and/or maintains in the regular course of business.

2. My specific credentials supporting my expertise in the AMA Current Procedural Terminology ("CPT") include, as exhibit "A" more fully explains:

A. CPC,
B. CPC-H,
C. CPC-P,
D. CCS-P,
E. MCS-P,
F. CHC

3. In addition to these professional credentials, I have taught, authored articles, and lectured on the use and application of the CPT. See Exhibit "A".

4. Most recently, in 2006, in my capacity as a National Independent Educator for the American Academy Of Professional Coders, I prepared and presented a seminar to professional coders in Honolulu, Hawaii, which provided them with approved continuing education units, to apply toward their annual CPC accreditation.

5. In addition to those matters stated above, my current CV, attached hereto and incorporated here, more fully states my professional expertise in both the intent and construction of the AMA Current Procedural Terminology (CPT), in current form, in all prior versions, as well as for the years 1996 and 1997.

6. Based upon exhibit "A" and my experience, background and education, I conclude that the CPT codes listed below for 1996 and 1997 are not, and never were, designed to be used solely by physical therapists. The term "therapist" in these codes was not intended by the drafters to only mean "physical" therapists. Had the drafters intended to impose the limitation they would have clearly stated it, and are more than competent to do so.

7. Further, based upon exhibit "A", and my experience, background, and education, I conclude that, with respect to the CPT codes listed below, nothing in the CPT for 1996, and 1997, prevented licensed massage therapists from performing the coded procedures listed below, when employed by, and when

under the direction of a medical doctor, particularly a physiatrist.

8. The term "therapist" used in the following procedures in the CPT, based upon my experience, background and education, has been utilized by licensed massage therapists. Moreover, the term "therapist" or "provider" in the CPT book, does not clarify specific licensures, particularly any exclusions of therapist types, in terms of the intent and language of the CPT to perform the following coded procedures.

9. The following are the disputed CPT codes from the 1996-97 version of the AMA's CPT. Unless otherwise indicated, there was no change from 1996 to 1997:

"Physical Medicine And Rehabilitation"

Modalities

Any physical agent applied to produce therapeutic changes to biologic tissue; includes but not limited to thermal, acoustic, light, mechanical, or electric energy.

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The application of a modality that does not require direct (one on one) patient contact by the provider.

97010 Application of a modality to one or more areas; hot or cold packs.

. . .

Constant Attendance

The application of a modality that requires direct (one on one) patient contact by the provider.

. . .

97035 ultrasound, each 15 minutes

. . .

Therapeutic Procedures

A manner of effecting change through the application of clinical skills and/or services that attempt to improve function.

Physician or therapist required to have direct (one on one) patient contact.

. . .

97110 Therapeutic procedure, one or more areas, each 15 minutes; therapeutic exercises to develop strength and endurance, range of motion and flexibility.

. . .

97250 Myofascial release /soft tissue mobilization one or more regions."

10. The CPT does not prohibit a medical doctor employing licensed massage therapists to provide the above procedures, and to bill payers for these services, at the physician's rate rather than the rate for "stand alone" or non-employee therapists. These are contract specific issues in which the CPT does not address.

11. The foregoing opinion is based upon a reasonable degree of certainty within the medical billing / coding profession, and my expertise therein.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 2006 at Aurora, Colorado.

"s/ ROBIN LINKER"

By _____

ROBIN LINKER, CPC, CPC-H, CPC-P, CCS-P, MCS-P, CHC

FILED
2006 MAR 14 3:52
E.M. RIMANDO
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STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

OMNIBUS REPLY BY PROVIDER-APPELLANT-APPELLANT EMERSON M.F. JOU, M.D. TO (2) RESPONDENT-APPELLEE AIG HAWAII INSURANCE COMPANY'S ANSWERING BRIEF And (2) APPELLEE-APPELLEE INSURANCE COMMISSIONER'S ANSWERING BRIEF

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[Pages 4 - 5 of the original document]

"including". Id. (AIG concedes the CPT system in its order prepared for the hearing officer). Reply Appn. 2-8, 7-18.

II. REPLY TO APPELLEE-APPELLEE INSURANCE COMMISSIONERS ANSWERING BRIEF

The Commissioner's arguments are not supported by standard medical "incident to" rules, the DCCA massage board, or his own decisions from which he is estopped from blowing hot and cold. The foregoing arguments in I are incorporated in reply to the commissioner's statements at his Ans.BR. 6-7.

Appellee needs to be reminded that Hawaii Department of Commerce And Consumer Affairs (DCCA) is headed by a director, who Appellees will concede, appoints insurance commissioners. HRS §431:2-102(a).

The Hawaii Board of Massage (State board) is also within the DCCA. HRS §26-9(c). Hearing officers, like Appellee commissioner, are appointed by the director of the DCCA. Id. at (f).

The Board of Massage has rendered an informal opinion which contradicts the commissioner's position on this appeal. Compare Reply Appn. 3 with the commissioner's Ans. Br. At 7 ¶7.

The insurance commissioner has no authority to make up rules in appellate briefs, particularly those which govern massage therapy,or its scope of licensure.

A specific statute, HRS §452-6 (Appn. Op. BR.), confers this authority on the state board. Certainly, the state board's informal opinion about the scope of an LMT license is entitled to much more weight than unsupported theories in an insurance commissioner's appellate brief.

There is no overlapping power vested in Appellee commissioner over the scope of licensure of massage therapists or physicians employing them. The commissioner's authority is narrowly restricted to the insurance code. HRS §431:2-201. The new rules the commissioner is espousing are subject to chapter 91, the administrative procedures act. Id. subd.(b)(1).

In addition to the state board, another independent subdivision of the DCCA, the hearings officers, authorizes physicians to (1) prescribe massage therapy (2) have the therapy done by employees of the physician (3) at the physician's clinic (4) bill the physicians rate under "incident to service" rates (Reply Appn 4-6, 15 and 17), and (5) use codes which may be used by any provider whose scope of licensure includes the delivery of massage therapy.

While Appellee commissioner may sign off on the opinions of hearing officers, as here, he may not blow hot and cold, depending on the insurer involved, or directions of political breezes.

CONCLUSION

The Judgment must be reversed. If remanded, the matter should be heard before a different judge.

[End page 5 of the original document]

Related Change Request #: N/A
Number: SE0441
Effective Date: N/A

Medlearn Matters

Revised

"Incident to" Services

Note: This article was revised on November 1, 2004, to correct the spelling of physician assistants in the background section.

Provider Types Affected
All Medicare providers of professional services

Provider Action Needed
None. This article is for your information only. It clarifies when and how to bill for services "incident to" professional services.

Background
The intent of this article is to clarify "incident to" services billed by physicians and non-physician practitioners to carriers. "Incident to" services are defined as those services that are furnished incident to physician professional services in the physician's office (whether located in a separate office suite or within an institution) or in a patient's home.
These services are billed as Part B services to your carrier as if you personally provided them, and are paid under the physician fee schedule.

Note: "Incident to" services are also relevant to services supervised by certain non-physician practitioners such as physician assistants, nurse practitioners, clinical nurse

specialists, nurse midwives, or clinical psychologists. These services are subject to the same requirements as physician-supervised services.
Remember that "incident services" supervised by non-physician practitioners are reimbursed at 85% of the physician fee schedule. For clarity's sake, this article will refer to "physician" **services as inclusive of nonphysician practitioners.**

To qualify as "incident to," services must be part of your patient's normal course of treatment, during which a physician **personally performed an initial service** and remains **actively involved** in the course of treatment.
You do not have to be physically present in the patient's treatment room while these services are provided, but you must provide **direct supervision,** that is, you must be present in the office suite to render assistance, if necessary. The patient record should document the essential requirements for incident to service.
More specifically, these services must be all of the following:

- An integral part of the patient's treatment course;
- Commonly rendered without charge (included in your physician's bills);
- Of a type commonly furnished in a physician's office or clinic (not in an institutional setting); and
- An expense to you.

Examples of qualifying "incident to" services include cardiac rehabilitation, providing non-selfadministrable drugs and other biologicals, and supplies usually furnished by the physician in the course of performing his/her services, e.g., gauze, ointments, bandages, and oxygen. The following paragraphs discuss the various care settings, which are important to note because the processes for billing vary somewhat depending on the care site.

Your Office

In your office, qualifying "incident to" services must be provided by a caregiver whom you directly supervise, and who represents a direct financial expense to you (such as a "W-2" or leased employee, or an independent contractor).

You do not have to be physically present in the treatment room while the service is being provided, but you must be present in the immediate office suite to render assistance if needed. If you are a solo practitioner, you must directly supervise the care. If you are in a group, any physician member of the group may be present in the office to supervise.

Hospital or SNF

For inpatient or outpatient hospital services and services to residents in a Part A covered stay in a SNF the unbundling provision (1862 (a)(14) provides that payment for all services are made to the hospital or SNF by a Medicare intermediary (except for certain professional services personally performed by physicians and other allied health professionals). Therefore, incident to services are not separately billable to the carrier or payable under the physician fee schedule.

Offices in Institutions

In institutions including SNF, your office must be confined to a separately identifiable part of the facility and cannot be construed to extend throughout the entire facility. Your staff may provide service incident to your service in the office to outpatients, to patients who are not in a Medicare covered stay or in a Medicare certified part of a SNF.

If your employee (or contractor) provides services outside of your "office" area, these services would not qualify as "incident to" unless you are physically present where the service is being provided. One exception is that certain chemotherapy "incident to" services are excluded from the

bundled SNF payments and may be separately billable to the carrier.

In Patients' Homes

In general, you must be present in the patient's home for the service to qualify as an "incident to" service.

There are some exceptions to this direct supervision requirement that apply to homebound patients in medically underserved areas where there are no available home health services only for certain limited services found in Pub 100-02, Chapter 15 Section 60.4 (B).

In this instance, you need not be physically present in the home when the service is performed, although general supervision of the service is required. You must order the services, maintain contact with the nurse or other employee, and retain professional responsibility for the service. All other incident to requirements must be met. A second exception applies when the service at home is an individual or intermittent service performed by personnel meeting pertinent state requirements (e.g., nurse, technician, or physician extender), and is an integral part of the physician's services to the patient.

Ambulance Service

Neither ambulance services nor EMT services performed under your telephone supervision are billable as "incident to" services.

Additional Information

To provide additional clarity, we present the following scenarios:

Must a supervising physician be physically present when flu shots, EKGs, Laboratory tests, or Xrays are performed in an office setting in order to be billed as

"incident to" services? "These services have their own statutory benefit categories and are subject to the rules applicable to their specific category. They are not "incident to" services and the "incident to" rules do not apply."

Can anti-coagulation monitoring be provided "incident to" a physician's services in an office?
Yes, if the requirements are met, i.e., the services are part of a course of treatment during which the physician personally performs the initial service and is actively involved in the course of treatment, is physically present in the immediate office when services are rendered by the employee, and the service represents an expense to the physician or other legal entity that bills for the service.

If the treating physician (Doctor X) refers a patient to an anti-coagulation monitoring clinic, can Doctor X bill these services as "incident to?"
No, because the services are not being provided by an employee under supervision of Doctor X.

Can the supervising physician (Doctor Y) at the anti-coagulation monitoring clinic (a physician group) bill the services as "incident to" if Doctor Y directly supervises those services at the clinic?
No, because Doctor Y is not treating the patient for the underlying condition. However, If Doctor Y receives a referral from Dr. X, and Dr. Y performs an initial evaluation of the patient and then orders and supervises the services, they may be billed by Doctor Y incident to her initial service. *If you have* further questions regarding this issue, please contact your carrier at their toll-free number, which may be found at: **www.cros.hhs.gov/medlearn/tollnums.asp**

Disclaimer

The information contained in this article was current at the time of its development.

We encourage users of this article to review statutes, regulations and other interpretive materials for the most current information.

Posted on: 1/12/2005

FILED
2005 FEB 28 PM 3:57
E.M. RIMANDO
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Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

RESPONDENT-APPELLEE AIG HAWAII INSURANCE COMPANY'S ANSWERING BRIEF

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

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and coder for AIG, reviewed the audits prepared by her predecessor at AIG, determining that the bill reviews done by AIG had been done properly.

7. Billings for an Officer Visit on August 7, 1996, were submitted under code 99205. AIG paid in accordance with code 99204, which best described the service performed by Dr. Jou.

8. Dr. Jou charged for state tax in all billings at issue. AIG did not pay for state tax, explaining in its Explanation of Review's that "No allowance was made for tax as the medicare fee schedule value already includes tax." In a letter dated October 30, 1995, an analyst from the Medicare Claims Administration confirmed that the Medicare allowances include tax.

Certified Record on Appeal (hereinafter "CR") 283-284.

B. Procedural Background

On March 18, 1999, Dr. Jou wrote to the DCCA, Insurance Division, requesting a hearing concerning a dispute regarding billings submitted to AIG. A Notice of Status Conference and Order Regarding Prehearing Statements was issued on May 31, 2002. C.R. 637-638. A hearing on the matter was held on September 18, 2002 before Hearings Officer Rodney Maile.

Transcript of Hearing (hereinafter "T"). Hearings Officer Maile requested attorney for Respondent, AIG Hawaii Insurance Company, Katharine M. Nohr, to prepare Respondent AIG Hawaii Insurance Company's Proposed Findings of Fact, Conclusions of Law and Recommended Order. T.162. Such were prepared and filed on December 19, 2002. C.R. 298-305.

[End Page 3 of the original document]

[Pages 6-10 of the original document]

IV. ARGUMENT

A. The Insurance Commissioner Correctly concluded that Provider was not entitled to receive payment for physical therapy performed by licensed massage therapists .

Hawaii Revised Statutes, Chapter452 regulates licensed massage therapist in the State of Hawaii. Under *HRS §452-1,* massage, massage therapy and Hawaiian massage are defined as:

> .. any method of treatment of a superficial soft parts of the body, consisting of rubbing, stroking, tapotement, pressing, shaking, or kneading with the hands, feet, elbow or arms, and whether or not aided by any mechanical or electrical apparatus, appliances, or supplementary aids such as

rubbing alcohol, liniments, antiseptics, oils, power, creams, lotions, ointments or other similar preparations commonly used in this practice. Any mechanical or electrical apparatus used as described in this chapter shall be approved by the United States Food and Drug Administration.

On the other hand, physical therapy under *HRS §461 J-1* means:

> .. the examination, treatment, and instruction of human beings to detect, assess, prevent, correct, alleviate and limit physical disability, bodily malfunction, pain from injury, disease and any other physical or mental condition as performed by physical therapists appropriately licensed under this chapter.

The practice of physical therapy includes, but is not limited to the use of the following:

> (1) Physical agents, such as heat, cold, water, air, sound, compression, light, electricity, and electromagnetic radiation;

> (2) Exercise with or without devices, joint mobilization, mechanical stimulation, biofeedback, posterial drainage, traction, positioning, massage, splinting, training in local motion, and other functional activities with or without assisting devices; and correction of posture, body mechanics and gait;

(3) Tests and measurements of: muscles strength, force, endurance and tone; joint motion, mobility, and stability; reflexes and automatic reaction; movement skill and accuracy; sensation and perception; peripheral nerve integrity; locomotor skill, stability and endurance; activities of daily living; cardiac, pulmonary, and vascular functions; the fit, function and comfort of prosthetic, orthotic and other assisting devices; posture and body mechanics; limb strength circumference, and volume; thoracic excursion and breathing patterns; vital signs; nature and locus of pain and conditions under which pain varies; photosensitivity; and home and work physical environments.

The billings that were submitted to AIG included hot or cold packs therapy, ultrasound therapy and myofascial release which are not within the scope of treatment allowed pursuant to *HRS §452-1.* Consequently, in light of the definition of the practice of physical therapy, it is clear that the Provider directed licensed massage therapists to perform therapy that is outside of the scope of their license, but is within the scope of a licensed physical therapist.

HRS §436B-26 states that:

The failure of any person to maintain a current and a valid license prior to engaging in any activity requiring licensure by the licensing authority shall prevent such person from

recovering in a civil action for work or services performed or materials or supplies furnished, or both, on a contract or any other legal basis to recover the reasonable value thereof. In light of such statutory provision, the Provider is prevented from recovering any monies for services performed by massage therapists that were not licensed to perform physical therapy.

This Court decided this very issue as it pertains to Dr. Jou in *AIG Hawaii Insurance Co. v. Emerson M.F. Jou, M.D. at at.,* (No. *24566 Aug. 24, 2004).* Attached hereto as Appendix "A". Such decision was issued "Not for Publication". Hawaii Rules of Appellate Procedure, Rule35(c) states that "A memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent." Such decision may be cited in this case as res judicata is applicable.

The doctrine of res judicata is applicable when three basic questions are answered in the affirmative: 1) whether the issue decided in the prior action is identical to the issue presented in the present action; 2) whether there was a final judgment on the merits in the prior action; and 3) whether the party against whom the doctrine is asserted was a party or in privity with a party to the previous adjudication. *Silver v. Queen's Hospital, 63 Haw.* 430, 629 P.2d 1116 (1981).

The issues decided in AIG, supra, were: 1) whether massage therapists employed by a physician

can bill using codes for physical therapists; 2) whether Hawaii's physical therapist or massage therapist licensure or regulation limits payments by the no-fault insurer for physical therapy services to persons licensed as physical therapists; 3) whether HRS §436B-26 (1993) allows physicians or the licensed massage therapists they employ from recovering for the same massage therapy services provided by physical therapists; 4) whether Dr. Jou or the licensed massage therapists were practicing physical therapy, as defined by HRS §461J-1(1993), when they performed massage therapy and used physical therapist payment codes; and 5) whether Dr. Jou's federal and state constitutional rights to due process of law and equal protection were violated.

The issues decided in the *AIG* case are identical to the matter at hand. Final Judgment was rendered and Dr. Jou and AIG were parties to such action and Dr. Jou is the party against whom the doctrine of res judicata is being asserted. Based thereon, this court should rely upon the Hawaii Supreme Court's decision that held as follows: "(1) Dr. Jou improperly billed AIG for physical therapy services which were provided by massage therapists employed by him who were not licensed as physical therapists; consequently, AIG does not have a duty to compensate Dr. Jou for such unlicensed activity, See *HRS* §436B-26; HRS §452-1 (1993); *HRS* §461 J-1; and HRS §453-1 (1993); and (2) Dr. Jou did not raise his constitutional arguments before the circuit court, such that these arguments are deemed waived on appeal . . . Furthermore, assuming arguendo that the constitutional issues were not waived, this court would disregard the claim because Dr. Jou failed to present a discernable argument beyond stating that there was a violation of his rights,....therefore it is HEREBY ORDERED that the circuit court's September 12, 2001

final judgment is affirmed." (citations omitted).

Application of the above Hawaii Supreme Court case to which Provider and AIG were parties is dispositive to all issues in this appeal.

B. The Lower Court Properly Interpreted *HRS* Section 452-1

Provider has asserted that the "Court Reversibly Rewrote *HRS* Section 452-'1". Opening Brief of Provider-Appellant-Appellant Emerson M.F. Jou, M.D. (hereinafter "Opening Brief") at 7. In making such argument, Provider has quoted only a portion of such statute, focusing on the language: "whether or not aided by any mechanical or electrical apparatus", in order to argue that ultrasound, hot and cold pack therapy and therapeutic exercise fall within. *Id.* Provider asserts that the lower court erred in determining that such definition concerning massage therapy does not include the provision of ultrasound, hot and cold pack therapy and therapeutic exercise. In order to ascertain whether the lower court was correct, we must examine the entire statutory provision. Such provision defines "massage", "massage therapy," and "Hawaiian massage."

HRS §452-1 states as follows:

> "Massage", "massage therapy", and "Hawaiian massage" commonly known as lomilomi, means any method of treatment of the superficial soft parts of the body, consisting of rubbing. stroking,

tapotement, pressing, shaking, or kneading with the hands, feet, elbow, or arms, and whether or not aided by any mechanical or electrical apparatus, appliances, or supplementary aids such as rubbing alcohol, liniments, antiseptics, oils, powder, creams, lotions, ointments, or other similar preparations commonly used in this practice. Any mechanical or electrical apparatus used as described in this chapter shall be

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FILED
2005 JAN 19 PM 1:40
K. HAMAKADO
CLERK, APPELLATE COURTS
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Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

OPENING BRIEF OF PROVIDER-APPELLANT-APPELLANT EMERSON M.F. JOU, M.D.

APPENDIX

STATEMENT OF RELATED CASES

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CONCLUSION

APPENDIX

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

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P&C insurance is good business for AIG and other insurers in Hawaii. Apart from taking in over $1.5 billion in premiums from life and annuity insurance sold in Hawaii, in 2002, P&C insurers made another nearly $1.8 billion in the other lines, including auto, and paid only $708,842,369.00 in claims. See Report of the Insurance Commissioner of Hawaii 2003 at page 45. ("Cmr Rpt"). Appendix to brief ("Appen").

Included in the $1.1 billion or so which the P&C insurers did not use to pay claims in 2002, are the amounts owed to doctors, including Appellant, Emerson M.F. Jou, M.D. While many tools are employed by insurers to evade payment, the method AIG employed here was down-coding.

The most common way Appellant and other doctors treat AIG's insureds, is on a fee for service basis. When this is done pursuant to an insurance policy mailed to auto insureds, the policy uniformly contains the same fundamental promise to pay doctors for the covered, medically necessary services they render in accordance with standard medical coding procedures. To afford Appellee's insureds' medical treatment in geographic areas or specialties in which they have no doctors under contract, AIG makes it known to the medical community at large that they will pay doctors on a fee for service basis for treating their insureds even though there is no direct contract between them.

Once promised payment, Appellant Jou provided medical services to Appellee's insured in reliance upon

those representations. In terms of compensation, doctors providing services simply accept the payment AIG provides through the mail.

In this fee for service context, Appellant was required to submit his claims for payment on an HCFA-1500, which makes use of Current Procedural Terminology ("CPT") codes-standard numerical descriptions developed by the AMA to describe the range and intensity of the services doctors provide. AIG failed to disclose, however, is that it developed and deployed automated processing schemes. Instead of paying doctors pursuant to standard coding procedures, these schemes denied, reduced, or delayed payment by bundling, downcoding, refusing to recognize modifiers, and "pending" claims – tactics this Court is by now intimately familiar with. Once AIG has processed the instant claims of Appellant, reduced payment was mailed, along with an Explanation of Review ("EOR") that disguised the reasons payment was reduced, and failed to disclose the automated processing tactics that AIG actually used, thereby inducing Dr. Jou to accept payment on that basis.

B. Facts

1. From August 7, 1996 to February 13, 1997, Albert Watanabe ("claimant") was insured by Respondent under an automobile no-fault insurance policy Respondent-Appellee issued in the State of Hawaii ("the no-fault policy"). RA 32. During this period, massage therapy was prescribed to claimant as a result of a covered accident, by Appellant Emerson M.F. Jou, M.D. a physician licensed in the State of Hawaii. Id.

2. Between August 7, 1996 to February 13, 1997, licensed massage therapists employed at Provider's Clinic provided services to claimant which were coded by Provider, and submitted as claims to Appellee, AIG. Id. Employees of AIG thereafter made a determination to reduce by downcoding the insurance payments claimed by Provider. AIG changed the codes used by Provider. to reflect the reductions in payment. Id.

3. AIG's representative testified as an expert at the agency hearing that payment reductions to Appellant Jou were made wherever the services performed by his licensed massage therapists were not found by AIG's employees to be listed in the Hawaii Statute defining massage therapy, i.e. HRS 452-1 (Appen). Id.

4. Using this rationale to reduce the benefits claimed by the Provider under the no-fault insurance policy, AIG improperly reduced the payment Provider claimed under the following treatment codes: 97010 (cold pack therapy, ultrasound therapy, and therapeutic exercises); 97250 (myofascial release). Id.

5. AIG's representative testified (as an expert) at the hearing in this matter that payment reductions were also made for office visits by AIG's insured to the Provider. The method used by other AIG employees to reduce the benefit claimed for the office visits was to determine that the visits reflected medical decision-making of moderate complexity, as opposed to high complexity. Id.

6. The AIG employees also refused to pay state tax included in the coding system used by AIG. Id.

7. None of the decisions to reduce benefits claimed by Provider were made by physicians or massage therapists licensed in the State of Hawaii. RA 33.

II. POINTS OF ERROR

1. The trial court violated the due process clauses of the Fourteenth Amendment to the United States Constitution And Article I §5 of the Hawaii State Constitution, in two ways:

A. First, the court, by upholding the agency violated Dr. Jou's right to work in a common occupation in his community. The court's error occurred in the record at Tr.(6-1-04)21. This error was made clear to judge Hifo by warning, during oral argument, before the court ruled. Id. 8:23-25; 10:15-25; 11:1-4; 15:2-6.

B. Second, judge Hifo violated Dr. Jou's rights by upholding the commissioner's rewrite of a statute, or rulemaking. This error is at Tr.(6-1-04)21. The error was made clear to judge Hifo by warning in the brief below, at page 7, and 32, 33, at in the objection to rulemaking at Tr.(6-1-04)7:9-25; 8; 10.

2. The trial court violated the separation of powers doctrine at Art V §6 of the Hawaii Constitution by rulemaking or rewriting HRS §452-1 to eliminate, or treat as surpasage, two phrases which support Appellant Jou's right to work in the state as a physiatrist, employing licensed massage therapists. RA 33-36 page 2. The error occurred in the record at Tr.(6-1-04)21. The court was warned against this error in the brief at RA 33-36. The court also violated the

separation of powers doctrine in the Federal Constitution.

3. Judge Hifo violated, at Tr.(6-1-04)21 of this record, the equal protection clauses of the Fourteenth Amendment to the United States Constitution, and the Hawaii State Constitution at Art. 1 §5. This error was brought to the Court's attention by warning in argument at Tr.(6-1-04)9:19-25; 12:12-17.

4. Judge Hifo violated rules of statutory construction which required her to give force to, and preserve all words of the statute; here, HRS §452-1. The court's violation occurred at Tr.(6-1-04)21 in this record. Appellant warned against the error at RA 35-37.

5. Judge Hifo reversibly upheld the use by Appellee AIG of a certified bill coder as an expert, by her ruling at Tr.(6-1-04)21. Appellant warned against this error at RA 37, 38, claiming inter alia, that the expert was unreliable in that (1) AIG's refusal had already been admitted and (2) the expert had no license which qualified her to testify about the application of law or medicine to the physicians' billing codes.

III. STANDARD OF REVIEW

Questions of constitutional law and statutory construction are reviewed de novo.

VI. ARGUMENT

A. Court Reversibly Rewrote HRS §452-1

The trial court unconstitutionally upheld the agency's nullification of a statute. HOH Corporation v.

Motor Veh. Lic. Board, DCCA, 69 Haw. 135, 140, 141, 736 P.2d 1271 (1987). Tr(6-1-04)19-21. The commissioner's determination of which procedures are within, or without, the scope of the statute defining massage therapy was rulemaking in violation of HRS §91, and the due process clauses of the Fourteenth Amendment to the United States Constitution, and Article I Section V of the Hawaii State Constitution.

Specifically, HRS §452-1 defines massage as an open set of treatment methods, "whether or not aided by any mechanical or electrical apparatus . . . Any mechanical or electrical apparatus used as described in this chapter shall be approved by the United States Food And Drug Administration" Emphasis added.

The same chapter delegated rule-making authority "for purposes of this chapter" in HRS §91, to the board of massage therapy. See HRS §452-1 (defining board), and HRS §452-6(a) (grant of authority).

B. Court Reversibly Engaged In Agency Rulemaking

The circuit court, informed that the commissioner was rule-making (Tr(6-1-04)7), in violation of the constitution's due process clause, reversibly upheld conduct which touched "the affairs of the entire public and delineat[ed] the future rights of an entire class of unnamed individuals." In Re Water Use Permit Appln, 94 Haw. 97, 170, 9P.3d 409, 482 (2000).

C. Court Violated Rules Of Statutory Construction

The court violated its duty to give effect to the plain and obvious meaning of the statutes defining what services a licensed massage therapist could legally

perform (HRS §452-1), and who was charged with making the rules to apply that statute. HRS §452-6(a). Kim v. Reilly, 105 Haw. 93, 95, 94 P.3d 648 (2004). The effect of the court's breach constitutional and statutory duties was to pick and chose which therapeutic procedures were included in the statutory definition of massage therapy, HRS §452-1.

The upshot of these arbitrary and uninformed distinctions, which the court was ill-equipped to make, was permit AIG to avoid paying doctors for services. Tr(6-1-04)9,10. At the same time, AIG could continue to sell insurance in Hawaii by assuring the public it will pay the doctors, (profitably so). In 2002, AIG Hawaii Ins. Co. Inc. wrote direct premiums in the state of $92,229,052 out of which it only paid claims of $45,723,744. Report of the Insurance Commissioner of Hawaii 2003, at 19. Appen.

Appellee AIG no incentive to pay Dr. Jou for medical massage rendered by his employees because it knew the commissioner would defer to the DCCA hearing's officer who, in turn, deferred to AIG's s skewed claims handling. Tr(6-1-04)15:25, 16-18.

AIG's nonpayment boiled down to an assertion that massage therapists licensed in Hawaii were prohibited from providing ultrasound, hot and cold pack and therapeutic exercises. Id at 16:19-23. The court below was well informed that this position is not supported by the law. Tr(6-1-04)13:23-25, 14. In fact the statutory definition of massage unambiguously states "whether or not aided by any mecnanical or electrical apparatus." HRS §452-1. Without question, ultrasound and hot and cold packs are within these two categories, of massage. Equally clear is the congruity

between the massage statute's definition, "means any treatment of the superficial parts of the body," and therapeutic exercises. HRS §452-1. But see Tr(6-1-04)16:23. The circuit court violated the command that it not render these clauses or sentence in the statute superfluous, void or insignificant since the construction Appellant urged is obviously found in HRS §452-1, "which will give force to an preserve all words of the statute." Ben Haw. Inc. v. Kida, 96 Haw. 289, 309, 30P.3d 895, 913. Ignoring the phrases in statute "whether or not aided by any mechanical or electrical apparatus," and "means any treatment of the superficial parts of the body," was a statement by Appellee commissioner, upheld by the court (Tr(6-1-04)21) of general or particular applicability and future effect that implements interprets or prescribes law or policy," (rule-making). Vega v. National Union Fire, 67 Haw. 148, 154-156, 682 P.2d 73 (1984).

Disregarding the phrases in HRS §452-1 was nullification of the statute, well beyond the powers of the agency or the circuit court. HON Corp, supra 69 Haw at 140, 141. The circuit court should not have affirmed. Tr(6-1-04)21.

"Neither the courts nor the administrative agencies are empowered to rewrite statutes to suit their notions of sound public policy when the legislature has clearly and unambiguously spoken." State v. Harada, 98 Haw. 18, 50, 41 P.3d 174, 206 (2002) (citing 1.N. Singer, Sutherland, Statutory Construction §306 at 55 (5th ed. 1992-94). Emphasis added.

D. Court Committed Error Of Law

The insurance commissioner's decision was contrary to HRS §452-1 and the framework of motor vehicle reparations law. The result was clear error of law, which the appellate courts are duty-bound to correct. Dang v. GEICO, 89 haw. 8, 12, 967 P.2d 1066, 1070 (1998). Violating law to make new law is a power not conferred upon the commissioner, or upon the executive branch. Appellee thereby violated the separation of powers doctrine in Article V §6 of the Hawaii Constitution.

E. Court Violated Appellant's Right To Work And Singled Him Out From Other Doctors Unfairly

Appellant Jou contends that the circuit court arbitrarily and unreasonably limited his right to practice his profession of choice. The Supreme Court recognizes that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" that the Constitution was meant to protect. Truax v. Raich, 239 U.S. 33, 41, 60 L.Ed. 131, 36 S.Ct. 7 (1915). "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment". Greene v. McElroy, 360 U.S. 474, 492, 3L.Ed.2d 1377, 79 S.Ct. 1400 (1959); see Hampton v. Mow Sun Wong, 426 U.S. 88, 115-16, 48 L.Ed.2d 495, 96 S.Ct. 1895 (1976) (holding statute barring aliens from Civil Service unconstitutional); City of Mobile v. Bolden, 446 U.S. 55, 64 L.Ed.2d 47, 100 S.Ct. 1490 (1980) (Marshall, J. dissenting) (noting constitutional importance of opportunity for employment). The Ninth Circuit has

consistently held that the due process clause provides people with a constitutional "right to pursue an occupation." Benigni v. City of Hemet, 879 F.2d 473, 478 (9th Cir. 1988); Chalmers v. City of Los Angeles, 762 F.2d 753, 757 (9th Cir. 1985).

F. The Court Violated Appellant's Equal Protection Rights

The rewrite by the commissioner and the court, disregarding key phrases of HRS §452-1 were never explained or analyzed. Ignoring and refusing to apply the statutory language was arbitrary and irrational and was without any legitimate government objective. It was "judicial legislation of the most rank order". State (Chiles) v. Physical Therapy Rehab Center etc., 665 S.2d 1127, 1131 (Fla App. 1996).

[End Page 12 of the original document]

CHAPTER 452
MASSAGE

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452-3 MASSAGE THERAPY ESTABLISHMENTS TO BB LICENSED
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452-24 DISCIPLINARY ACTIONS
452-25 RIGHT OF INJUNCTION
452-26 CUMULATIVE REMEDIES

Note

Chapter heading amended by L 1980, c 208, §2.

Subject to reassessment, this chapter is repealed effective December 31, 1999. Section 26H-4.

Cross References

Health care professionals, see chapter 451D.

§452-1 Definitions. For the purpose of this chapter, the following definitions shall be adopted:

"Board" means the board of massage therapy created under this chapter.

"Massage", "massage therapy", and "Hawaiian massage" commonly known as lomilomi, means any method of treatment of the superficial soft parts of the body, consisting of rubbing, stroking, tapotement, pressing, shaking, or kneading with the hands, feet, elbow, or arms, and whether or not aided by any mechanical or electrical apparatus, appliances, or supplementary aids such as rubbing. alcohol, liniments, antiseptics, oils, powder, creams, lotions, ointments, or other similar preparations commonly used in this practice. Any mechanical or electrical apparatus used as described in this chapter shall be approved by the United States Food and Drug Administration.

"Massage therapist" means any person who engages in the occupation or practice of massage for compensation.

"Massage therapist apprentice" means any person who engages in the occupation or practice of massage under the direct supervision of a sponsoring massage therapist who is employed by or registered with an approved massage establishment.

"Massage therapist student" means any person who engages in the study or practice of massage therapy who is under the direct supervision of the teacher in a school setting.

"Massage therapy establishment" means premises occupied and used for the purpose of practicing massage therapy or massage therapy training; provided that when any . massage therapy establishment is situated in any building used for residential purposes, the massage therapy establishment premises shall be set apart and shall not be used for any other purpose. [L 1947, c 192, §1; RL 1955, §63-1; HRS §452-1; am L 1980; c 208, §3; am L 1981, o65, § 1; am L 1987, c 190, §2; am L 1989, c 204, §1; am L 1990, c 205, §1]

§452.2 License required. (a) It is unlawful for any person in the State to engage in or attempt to engage in the occupation or practice of massage for compensation without a current massage therapist license issued pursuant to this chapter.
(b) A massage therapist apprentice who has a permit, or a massage therapist student under the direct supervision of a teacher in a massage school setting, is also permitted to engage in or attempt to engage in the occupation or practice of massage. [L 1947, c 192, §2; RL 1955, §63-2; HRS §452-2; am L 1980; c 208, §4; am L 1981, c 65, §2; am L 1985, c 95, §1; am L 1989, c 204, §2]

§452-3 Massage therapy establishments to be licensed. No massage therapy establishment shall be operated unless it has been duly licensed as provided for in this chapter. [L 1947, c 192, §3; RL 1955, §63-3; HRS §452-3; am L 1980, c 208, §5; am L 1981, c 82, §28; am L 19[illegible], c 190, §3; am L 1990, c 205, §2]

§452-4 Creation of state board; qualifications. (a) There is established within the department of commerce and consumer affairs for administrative purposes a state board of massage consisting of five members.

(b) Three members shall have at least three years of practical experience as licensed massage therapists, who shall be actively employed as massage therapists, and two shall be public members.

(c) Board members affiliated with any school teaching massage or any apprenticeship or other massage therapy training program shall disclose that affiliation and shall at all times adhere to the provisions of chapter 84 and the interpretations of that chapter by the state ethics commission. [L 1947, c 192, §4; RL 1955, §63-4; am L Sp 1959 2d, c 1, §5; HRS §452-4; am L 1978, c 208, §5; am L 1980, c

208, §6; am L 1982, c 204, §8; am L 1987, c 190, §4; am L 1989, c 204, §3; am L 1992, c 202, §95; ree L 1993, c 322, §8]

Cross References

Departmental administration, see §§26-9 and 26-35.

§452-5 REPEALED. L 1992, c 202, §208.

§452-6 Powers and duties of the board. (a) The board shall adopt rules pursuant to chapter 91 for the purposes of this chapter.

(b) In addition to any other powers and duties authorized by law, the board may grant, or upon proof of violation of this chapter or the rules adopted by the board governing the practice under this chapter, revoke,

suspend, or refuse to renew a license as provided in this chapter.

(c) The board shall adopt rules pursuant to chapter 91 relating to massage therapist apprenticeship and training including rules establishing qualifications for apprenticeship permits and training programs and the requirements to be met by massage therapist apprentices prior to taking the massage therapist license examination.

(d) The executive secretary, under the direction of the board, shall issue subpoenas for the attendance of witnesses before the board with the same effect as if the. subpoenas were issued in an action in the circuit court, and shall, under the direction of the board, administer oaths in all matters pertaining to the duties of the executive secretary's office or connected with the administration of the affairs of the board. Disobedience of a subpoena and false swearing before the executive secretary or the board shall be attended by the same consequences and be subject to the same penalties as if the disobedience or false swearing occurred in an action in the circuit court. [L 1947, c 192, pt of §6; am L 1949, c 97, pt of §1.; RL 1955, §63-6; am L 1965, c 96, §45; HRS §452-6; am L 1979, c 105, §44; am L 1980, c 208, §8; am L 1981, c 65, §4; gen ch 1985; am L 1986, c 99, §4; am L 1989, c 204, §4; am L 1992, c 202, §96]

Case Notes

Power to refine certificate; moral turpitude. 38 H. 584.

§§452-7, 8 REPEALED. L 1992, c 202, §§209, 210.

§452-9 Records of board. The board shall keep a record of all of its proceedings and activities including all applications, and the action taken thereon. The books and records of the board shall be prima facie evidence of

matters therein contained, and shall constitute public records. [L 1947, c 192, §8; RL 1955, §63-9; am L 1959, c 109, §1; HRS §452-9; am L 1980, c 208, §11]

§452-10 REPEALED. L 1980, c 208, §12.

§452-11 Assistance to board. The board may call to its aid any person or persons of established reputation and known ability in their profession, for the purpose of conducting examinations, inspection, and investigations of all persons affected by this chapter. [L 1947, c 192, §11; RL 1955, §63-11; HRS §452-11; am L 1980, c 208, *13]

§602-4 Superintendence of inferior courts. The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law. [I. 1892, c 57, §50; RL 1925, §2223; RL 1935, §3592; RL 1945, §9603; RL 1955, §214-3; HRS §602-4; ree L 1979, c 111, pt of §2]

§603-41 When judge may be required to preside in another circuit; temporary assignment of retired circuit judges. Whenever it is advisable, by reason of the disqualification of any circuit judge, or the judge's inability to attend to the judge's duties or there is a vacancy in the office of any circuit judge, or a congestion of work in any circuit court, or for any other reason, the chief justice of the supreme court may assign and require the judge of any other circuit, or any retired circuit judge, from any circuit, to hear and determine any or all matters then or thereafter pending in the circuit to which the judge is assigned for such purpose, and to perform any other duties pertaining to the office of circuit judge of the circuit to which the judge is so assigned, and while so engaged the judge shall have and exercise all the

powers vested in a judge of that circuit. A judge serving temporarily shall not be actively engaged in the practice of law. Temporarily assigned retired circuit court judges shall be compensated per diem at a rate of pay equivalent to that of circuit court judges. [L 1892, c 57, §45; am L 1901, c 12, § 1; am L 1923, c 164, § 1; RL 1945, §9642; am L 1949, c 37, §1; RL 1955, §215-12; HRS §603-41; am L 1972, c 88, §3(s); am L 1983, c 244, §3; gen ch 1993]

In Hawaii, the practice of medicine is defined by HRS §453-1 as follows:

> "For the purposes of this chapter the practice of medicine includes the use of drugs and medicines, water, electricity, hypnotism, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject; provided that when a duly licensed physician pronounces a person affected with any disease hopeless and beyond recovery and gives a written certificate to that effect to the person affected or the person's attendant nothing herein shall forbid any person from giving or furnishing any remedial agent or measure when so requested by or on behalf of the affected person". Emphasis added.

FILED
2004 DEC-7 PM 3:33
K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **03-1-2106**
Provider-Appellant-Appellant,	)
vs.	)
	)
J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawaii,	)
Appellee-Appellee,	)
and	)
AIG HAWAII INSURANCE CO.,	)
Respondent-Appellee.	)

RECORD ON APPEAL

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(To Record on Appeal

EMERSON M.F. JOU, M.D.
Provider-Appellant-Appellant,

versus

J.P. SCHMIDT, Insurance Commissioner,
Department Of Commerce and Consumer Affairs,
State of Hawaii, Appellee-Appellee,

and

AIG HAWAII INSURANCE CO.,
Defendant-Appel lee.)

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TO RECORD ON APPEAL: **CIVIL NO. 03-1-2106**

The original record in CIVIL NO. 03-1-2106, Circuit Court, First Circuit, State of Hawaii, as herein entitled, contains all of the original documents entered of record in said matter.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

See attached Index Sheets

NOTE:

Yellow and white pages attached to the rear portion of the Record on Appeal are the original minutes entered by the Clerks of Court, First Circuit Court. Original minutes are not part of the Record on Appeal, pursuant to HRAP, Rule 10(a).

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FIRST CIRCUIT COURT
STATE OF HAWAII

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TITLE OF CASE	ATTORNEY(S)	ATTY ID
JOU, MERSON M F MD	SHAW, STEPHEN MICHAE	A4336
SCHMIDT, J P		
AIG HAWAII INSRUANCE CO.		

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1st Circuit Court
2004 OCT-8 PM 3:21
H. CHING
CLERK

Attorneys for Provider-Appellant
EMERSON M.F. JOU, M.D

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant, vs. J.P. SCHMIDT, Insurance Commissioner, Department Of Commerce and Consumer Affairs, State of Hawai'i, Appellee, AIG HAWAII INSURANCE CO., Defendant.	Civil No.03-1-2106-10(SSM) (Agency Appeal)

NOTICE OF APPEAL TO HAWAII SUPREME COURT

NOTICE is hereby given that Plaintiff EMERSON M.F. JOU, M.D., by and through his attorney Stephen M. Shaw, pursuant to Section 641-1 Hawaii Revised Statutes, and Rule 3 of the Hawaii Rules of Appellate Procedure, appeals to the Supreme Court and Intermediate Court of Appeals of the State of Hawaii from the Judgment filed 9-9-04 ("Exhibit "A") in this case, and all prior orders, judgments and decrees, in this

case made by the Circuit Court of the First Circuit, State of Hawaii.

The CADs form is filed with this Notice.

DATED: Honolulu, Hawaii, October 8, 2004.

"s/Stephen M. Shaw"
STEPHEN M. SHAW
Attorney for Provider-Appellant
EMERSON M.F. JOU, M.D.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant, vs. J.P. SCHMIDT, Insurance Commissioner, Department Of Commerce and Consumer Affairs, State of Hawai'i, Appellee, AIG HAWAII INSURANCE CO., Defendant.	Civil No.03-1-2106-10(SSM) (Agency Appeal)

COPY

TRANSCRIPT

Of proceedings before the HONORABLE SABRINA McKENNA, Judge, Presiding, on Tuesday, June 1, 2004. Oral Arguments.

APPEARANCES:
STEPHEN SHAW, ESQ.
For the Provider-Appellant

DAVID WEBBER, ESQ. For the Appellee

KATHERINE NOHR, ESQ. For the Defendant

Reported by:
Priscilla Gonzaga, CSR #127
Notary Public, State of Hawaii

(Case called.)

MR. SHAW: Good morning, Your Honor. Steven Shaw on behalf of Emerson M.F. Jou, appellant.

THE COURT: Good morning.

MS. NOHR: Katherine Nohr on behalf of AIG of Hawaii Insurance company who is respondent appellee.

THE COURT: Good morning.

MR. WEBBER: Good morning, Your Honor. David Webber, Deputy Attorney General on behalf of the insurance commissioner.

THE COURT: Good morning.

Alright. The Court has reviewed the papers. Any additional arguments, Mr. Shaw?

MR. SHAW: Yes, Your Honor. There's two main problems that this case raises. And one is that what is the scope of practice of the physician who is also a specialist in physiatry and what services can he bill for which are incident to his scope of practice? Of the -- my opponents, the appellees say that it's this

doctor is somehow is limited in his scope of practice and that he can't provide licensed massage therapy to patients as incident to his physician's services as a specialist in physiatry.

THE COURT: Is that what they found? I thought it was the fact that it was not -- I thought they didn't really address the issue. It was really more an issue of whether or not a massage therapist could actually be billing for physical therapy.

MR. SHAW: No, that's not it. What the problem is, if you look at the definitional statutes for medicine, physical therapy and massage therapy, if we go the way the appellees want us to go, then a physical therapist would have to have a license as a massage therapist before he or she could do those things defined as massage therapy.

Worse than that, if we follow the logic of the DCCA and the commissioner, a doctor would have to have subsidiary licenses of physical therapy if he was going to render physical therapy. And if he was rendering massage therapy he would have to have a massage therapist license.

And the reason that I refer to Judge Marks's decision is that her decision in a different factual setting goes through the hierarchy of these statutes. One includes the other. The massage therapist statute being the more narrowly drawn but still allows for the services that were rendered here.

And I quoted that statute in my reply. And I quoted the language that Judge Marks didn't refer to in my state who are employing licensed massage therapists.

THE COURT: To perform physical therapy? MR. SHAW: No, not to perform physical therapy but to do those things that I read into the

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[End Page 3 of the original document]

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* * * * * * * * *

[Pages 7 - 13 of the original document]

State who are employing licensed massage therapists.

THE COURT: To perform physical therapy?

MR. SHAW: No, not to perform physical therapy but to do those things that I read into the record that are within the definition of license - - of a licensed massage therapist. That will affect the future relationships between patients and doctors in the state.

As such, it was rule making. And it was rule making by the commissioner, even though he did it in the form of administrative rule making, it was still ruling make and it was prohibited by law for him to make that kind of rule because it affects all these future relationships and it affects an unknown amount of people in the future. It

doesn't just affect these particular litigants. So he deprived my client of the process which was due which go through your rule making procedure, give notice to the public, let all the doctors come in and make those arguments the Court's asking about now. What about the blood pressure? What about the EKG? What about the EEG? All of those different things that are done incident to a doctor's service which a doctor cannot be in the same room while they're happening. Otherwise, all medicine would be at a standstill.

So not only is the commissioner rule making, but the commissioner is actually singling out a group of individuals who are physiatrists who have licensed massage therapists working for them for special treatment in comparison to doctors who have nurses working for them or hospitals who have licensed massage therapists working for them. Or other - Rehab Center of the Pacific. Rather than rule make across the board and say well, let's do this with nurses too. Let's make sure that doctors become nurses. Let's get them out there and get some more licenses. And then also attorneys have to be certified as paralegals before they turn on the Lexus machine. It's ridiculous. It goes into absurdity and Judge Marks has dealt with that.

THE COURT: Judge Marks's decision is distinguishable because Judge Marks ruled that you couldn't require a physician to have a separate massage center type of license to bill for massage. In that case, they were licensed massage therapist conducting massages or

services that are ordinarily provided by massage therapist. So I see that case is completely distinguishable from this case.

MR. SHAW: Well, you know, it's not distinguishable in one sense. The insurance companies, as they relate to the insurance commissioner, do not want to pay for massage therapy. They will raise any defense they can. One was you've got to have a license -- massage parlor license. I'm the only one that thought that was ridiculous. Everybody thought why not, you know, license doctors as massage therapists.

Judge Marks didn't think it was a good idea. And her reasoning is important to this Court. And the reasoning and the way she reached her result was by hierarchy and also by public policy. A doctor doesn't need to be licensed as a massage therapist because the license of a physician subsumes the license of the massage therapist in one area and that is hygiene. The doctor's -- reason for the doctor's license, one of the big areas as it relates to massage therapy is that it's a clean place to see patients.

So there's really no reason in terms of economics or even on a fairly low level of scrutiny for the commissioner to single doctors out, a small group of them, usually sole practitioners and say you can't -- we're going to limit your scope of practice by a special rule and we're going to limit what you can do incident to services. Had the director gone through rule making, he would have come up against --he would have come up against the 453-1 defining the practice of medicine.

Which is about way more open than the statute that defines massage therapy.

I propose that as a attachment to my brief in the appendix. But the language I'm focusing on is where it says after hypnotism or any means or method or any agent either tangible or intangible for the treatment of disease in the human subject.

THE COURT: Where is that?

MR. SHAW: That's at 453-1 and I've included it with my appendix. Right after Judge Marks's decision. 453-1. It's right after 452-1 which was the massage therapy statute.

There's no way that the commissioner could have legitimately come in and said well, what we're going to do is make a rule that clarifies 453-1 so that doctors can employ licensed massage therapists and bill under codes to insurance companies any more. We're going to choke off the scope of the physician's practice and we're going to limit the services that are incident to that practice. It would never work by rule making so that's why they're going by agency common law.

Again, the statute defining massage therapy, it doesn't have a closed group of categories of things that a massage therapist can do. It includes the hot pack, cold pack and things that the insurer denied in this case.

So the Court is being asked essentially by the appellees to run the insurance business. Because what's going to happen is however the Court rules, AIG is going to go out and do this to other doctors and say well, look, now you doctors are going to have to have nurse's licenses and you're going to have to have subsidiary licenses because Judge McKenna said so in the case dealing with massage therapist.

And, you know, it sounds ridiculous when I make the statement. It sounded ridiculous when I heard that they were -- the insurance companies were requiring Dr. Jou to have a massage parlor license too. It sounds ridiculous. Nobody has a sense of outrage about it. I'm not a real medical person but it sounded completely outrageous. But they're really doing it and they're really serious and they had no way of justifying it to any court so far.

And the only judge who's really treated it any, you know, reasoning has been Judge Marks in her analysis and opinion that I attached.

So I don't think it's too farfetched to say that the insurance companies are going to go back and huddle and say well, you know, now that Judge Marks is requiring Dr. Jou to technically have a massage therapist license or even a physical therapy license before he can bill those services out, number 1. And number 2, he can't -- he has to be in the same room if anybody else performs those services because that's what the Court said.

Even though nurses don't have to be in the same room as the doctor. And when you're getting an EKG, the doctor isn't in the room when they put ATG stuff on you.

For some reason, no one knows and no one will know and there's been nothing in these briefs, the appellees want to single these doctors out who have licensed massage therapists working for them for special treatment other than those who have licensed nurses working for them. And believe me, Judge, they will extend the Court's ruling if the Court rules in favor of the appellee into other context as fast as they can.

And what will happen is of course we'll file an appeal. We have an appeal of Dr. Jou's involved in right now that was brought by another attorney Mr. Paul Maki against the same insurance company and I forget the name of its providers, Alliance vs. AIG and all these others. And that's in its fifth year. I think it's in its fourth year sitting before the supreme court. And all it is a simple issue over a simple statute. It never went to trial. It never -- was done by John Edmund's office.

It never went to trial. It was decided on motions.

It's whether or not a statute applies to hundreds of doctors that are assigned their rights to this association. And it's just been sitting there. So what that allows the insurance companies to do in the meantime is not pay. And this is what will happen here.

If the Court doesn't reverse, then we

have -- the only remedy that we can call a remedy is waiting in line behind, I think it's called Hawaii Providers Alliance and some of our cases that are languishing at the appellate level. In other words, there's no remedy. There's something wrong that was done, we have no remedy. No one can explain why a simple issue over a simple statute is taking four years before the appellate court. And if we don't get relief in the trial court, we don't get relief.

So I don't see any analysis in the appellees' arguments or anything dealing squarely with this phrase in the massage definition and

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[End Page 13 of the original document]

[Pages 1 - 2 of the original document]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant, vs. J.P. SCHMIDT, Insurance Commissioner, Department Of Commerce and Consumer Affairs, State of Hawai'i, Appellee, AIG HAWAII INSURANCE CO., Defendant.	Civil No.03-1-2106-10(SSM) (Agency Appeal)

OPENING BRIEF OF APPELLANT EMERSON M.F. JOU, M.D.

I. STATEMENT OF THE CASE

1. From August 7, 1996 to February 13, 1997, Albert Watanabe was insured by Respondent under an automobile no-fault insurance policy Respondent-Appellee issued in the State of Hawaii ("the no-fault policy"). Between August 7, 1996 and February 13, 1997, massage therapy was prescribed, as a result of a covered accident, to Albert Watanabe by Appellant Emerson M.F. Jou, M.D. a physician licensed in the State of Hawaii. Agency Record ("AR") 62 (evidence admitted).

2. Between August 7, 1996 to February 13, 1997, licensed massage therapists employed at Provider's Clinic provided services to Mr. Watanabe which were coded by Provider, and submitted as claims to Respondent-Appellee, AIG. AR 216-219, 223. Employees of AIG thereafter made a determination to reduce the insurance payments claimed by Provider and changed the codes used by Provider, to reflect the reductions in payment. AR 94, 101, 102.

3. AIG's representative testified as an expert at the agency hearing that payment reductions to Appellant, Dr. Jou were made wherever the service performed by his licensed massage therapists were not found by AIG's employees listed in the Hawaii Statute defining massage therapy, i.e. HRS 452-1 (Appen). AR 95; 126-132.

4. Using this rationale to reduce the benefits claimed by the Provider under the no-fault insurance policy, AIG improperly reduced the payment Provider claimed under the following treatment codes: 97010 (cold pack therapy, ultrasound therapy, and therapeutic exercises); 97250 (myofascial release). AR 80-84.

5. AIG's representative testified (as an expert) at the hearing in this matter that payment reductions were also made for office visits by AIG's insured to the Provider. The method used by other AIG employees to reduce the benefit-claimed for the office visits was to determine that the visits reflected medical decision-making of moderate complexity, as opposed to high complexity. AR 174, 175, 191, 204.

6. The AIG employees also refused to pay state tax included in the coding system used by AIG. AR 205.

7. None of the decisions to reduce benefits claimed by Provider were made by physicians or massage therapists licensed in the State of Hawaii. AR 107-112.

II. POINTS OF ERROR

A. Insurance Commissioner's Conclusion Of Law Illegally Restricts Physician Scope Of Practice

This appeal involves the contention by the Insurance Commissioner in the CFO (Appen) that AIG need not pay physician-appellant for not or cold pack therapy, ultrasound therapy,

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[End Page 2 of the original document]

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[Pages 4 - 5 of the original document]

01-1-1276); also, HRS §453-1. The Commissioner was well aware of these findings at the time he decided the issue. AR 265-272.

These COLs were in error because the medical services AIG disputes are not exclusively found within the definition in Hawaii Statutes of physical therapy; rather, the services are also within the definitions of the practice of medicine (HRS §453-1) and massage therapy. Compare HRS §452-1 (. . . whether or not aided by any

mechanical or electrical apparatus, appliance or supplementary aids . . .), with HRS §453-1. AR 270.

Second, these COLs were in error because the issue of full payment for the medical service of myofascial release was decided previously in Dr. Jou's favor by the same Insurance Commissioner in Jou v. Domingo, MVI-2002-14-P; MVI-2002-15-P (excerpt, Appen.) and by this Commissioner's predecessor in MVI-98-1175-P. AR 273.

The anticipated error by the Insurance Commissioner in upholding these COLs was brought to the DCCA hearing officer's attention at the hearing, by the rebuttal testimony of Appellant. AR 220-223. Again, the error was brought to the Commissioner's attention in the exceptions to the hearing officers decision. AR 30-275. Finally, the Commissioner was informed of the error during oral argument. AR 8-11, 15-17.

B. Insurance Commissioner Reversibly Adopted AIG's Proposed Findings Of Fact At No. 4 Which Were Distorted And Untrue

FOF 4 (AR 299) erroneously stated "Dr. Jou submitted treatment notes supporting the physical therapy services performed from August 7, 1996 to February 13, 1997." The FOF deliberately mischaracterized the services as "physical therapy" to support AIG's argument that only physical therapists (and not licensed massage therapists employed by and supervised by M.D.) could perform the services. AR 299, 301, 302. Appen.

The anticipated error by the Insurance Commissioner was first brought to the hearing's officers attention during the rebuttal testimony of Appellant physician. AR 216-219; 223.

C. Commissioner Schmidt Reversibly Adopted Findings Of Fact At No. 5 Which Were Untrue

FOF 5 erroneously states "AIG having been informed that licensed massage therapists were performing physical therapy without licenses to perform physical therapy . . ." This finding is error because it lacked evidentiary support. AR 209-213; 216-219.

Again, the FOF deliberately mischaracterized the services as "physical therapy" to support AIG's argument that only physical therapists (and not licensed massage therapists employed by, and supervised by M.D.) could perform the services. AR 299, 301, 302. Appen.

The anticipated error by the Insurance Commissioner was brought to the hearing's officers attention during the rebuttal testimony of Appellant physician. AR 216-219.

D. The Medical Evidence That Dr. Jou's Office Visits Were Properly Coded Was Uncontroverted

The COL asserted as erroneous under this point is at 6 of the FOF/COLs. Appen: "The evidence presented established that the office visit that was provided by Dr. Jou on August 7, 1996, was improperly coded by Dr. Jou using code 99205. AIG properly coded the service at 99204, which better reflected the level of service provided. The Provider did not meet his

burden of proof that code 99205 was the correct code for the procedure."

This COL was erroneous because there was no competent medical evidence to refute it. AR 116; 138-142. AIG's "expert" had no medical training or legal training. AR 180, 183, 187-213.

Further, the witness was not the individual who actually downcoded Dr. Jou's bills. AR 72 (transcript p. 15). She couldn't recall ever upcoding a bill. AR 106-116.

[End Page 5 of the original document]

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[Pages 8 - 9 of the original document]

The use of physicians to testify about CPT coding is the only way to satisfy the reliability prong under Montalvo. State v. Romero, 533 So.2d 1264, 1271 (La. 1988); Eagle v. Snyder, 412 Pa. Supper. 557, 604 A.2d 253, 258 (1992). The CPT codes are described:

> "n2 The services at issue are coded according to the Current Procedural Terminology (CPT), a uniform coding used in 'identifying, describing, and coding medical, surgical, and diagnostic services performed by practicing physicians'. A.M.A. Physicians' Current Procedural Terminology at iii (4th ed. 1986). The coding system is 'the most widely accepted

nomenclature for the reporting of physician procedures and services under government and private health insurance programs.' *Id.*" Newport News v. Loxley, 934 F.2d 511, 513 (U.S. App. 1991).

C. Appellant Reserves Tort And Constitutional Claims Against Appellees

"(I)t is well-settled that an administrative agency is a tribunal of limited jurisdiction. It may exercise only the powers granted by the statute reposing power in it." Penthany, Ltd. v. Gov't of the Virgin Islands, 360 F.2d 782, 790 (3d. Cir. 1966); Pittsburg County Rural Water Dist. No. 7 v. City of McAlester, 346 F.3d 1260, 1274-75 (10th Cir. 2003) (state agency's adjudicative decision could not determine federal cause of action that agency was not empowered to decide).

In Hawaii, even some courts are of limited jurisdiction. In re Doe, 96 Haw. 272, 284-85, 30 P.3d 878 (201) (Family Court). Other Hawaii State courts, being courts of limited jurisdiction, lack equity jurisdiction available in Circuit Court. Queen Emma Found v. Tingo, 74 Haw. 294, 304, 845 P.2d 1186 (1992). Hawaii's land court is a tribunal of limited jurisdiction. In re Rice, 68 Haw. 334, 335, 713 P.2d 426 (1986).

Attempts, in agency contexts, or on HRS §91 appeals to stray from the jurisdictional boundaries are a waste of judicial resources. State (by Kanbara) v. Hilo Metals, 53 Haw. 642, 644, 500 P.2d 743 (1972) instructs that ruling on issues outside the jurisdiction (here, an agency appeal) would result in a nullity. In that case, a district court judge heard a counterclaim

over which it had no jurisdiction. The Hawaii Supreme Court vacated that part of the district court's decision, and granted leave to file a new action in the circuit court. *Id.*

Agencies and courts hearing appeals therefrom are likewise tribunals of limited jurisdiction. In re Taxes Maui Agr. Co. Ltd., 34 Haw. 515, 544 (1938) and In re the tax Appeal of the Valley of The Temples, 56 Haw. 229, 231, 533 P.2d 1218 (1975) make clear that enlarging jurisdiction of special or limited tribunals, is reserved to the legislature.

At the same time, plaintiff provides notice that all of his constitutional claims to be asserted against AIG and the State of Hawaii are tolled and preserved for tribunals properly vested with jurisdiction over them. Branzburg v. Hayes, et.al., Judges, 408 U.S. 665, 671, 92 S.Ct. 2646 (1972); In re A.B., 791 P.2d 615, 621 (Alaska 1990); see AR 30-275; 293-295. These preserved claims are incorporated herein by reference from this agency's record at AR 30-275, 291-297, 449-474, 475-490, 537-546, 601-625.

CONCLUSION

Based upon the foregoing the CFO should be reversed and judgment including attorney's fees should be entered in Appellant's favor.

DATED: Honolulu, Hawaii, March 18, 2004.

"s/Stephen M. Shaw"
STEPHEN M. SHAW
Attorney for Provider-Appellant
EMERSON M.F. JOU, M.D.

[Page1 of the original document]

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
MAR 14 2006
at 2 o'clock
SUE BEITIA, CLERK

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EMERSON M.F. JOU, M.D.,	)	CIVIL NO.
	)	**06-00151**
Plaintiff,	)	SOM/KSC
vs.	)	
	)	COMPLAINT
HAWAII JUDICIAL SELECTION	)	JURY DEMAND;
COMMISSION, MELVIN I. CHIBA,	)	SUMMONS
Chairperson, ROSEMARY T. FAZIO,	)	[Civil Rights]
Vice Chair; LOIS M. SUZAWA,	)	
Secretary, And SYDNEY K. AYABE,	)	

Member; State of Hawaii, DOES 1-25;)
)
Defendants.)
)

COMPLAINT

Plaintiff EMERSON M.F. JOU, M.D., for a claim for prospective injunctive relief or prospective declaratory relief against Defendants above named, alleges:

1. Plaintiff is a citizen and resident of the City and County of Honolulu, District of Hawaii.

2. Plaintiff was at times relevant hereto duly licensed as a Physician by the State of Hawaii and is actively engaged in the practice of medicine.

End [Page1 of the original document]

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
MAY 08 2006
at 4 o'clock
SUE BEITIA, CLERK

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **06-00151**
Plaintiff,	) SOM/KSC
vs.	)
	)**NOTICE OF MOTION;**
HAWAII JUDICIAL SELECTION	)**PLAINTIFF'S MOTION**
COMMISSION, MELVIN I. CHIBA,	) **TO DISQUALIFY**
Chairperson, ROSEMARY T. FAZIO,	) **THE HONORABLE**
Vice Chair; LOIS M. SUZAWA,	)**MAGISTRATE JUDGE**
Secretary, And SYDNEY K. AYABE,	) **KEVIN S.C. CHANG;**
Member; State of Hawaii, DOES 1-25;	) **MEMORANDUM IN**
	) **SUPPORT OF MTN;**
Defendants.	) **DECLARATION OF**
	) **COUNSEL; COS**

DECLARATION OF COUNSEL

I, Stephen M. Shaw, counsel for EMERSON M.F. JOU, M.D., make this declaration in support of the

attached motion. Exhibits attached hereto are true and correct; the same are incorporated herein by reference and made a part hereof.

1. The Honorable Kevin S.C. Chang has been assigned to this case as Magistrate.

2. Judge Chang was formerly a judge on the State of Hawaii Circuit Court; as such Judge Chang has information, including possibly confidential information, regarding the Hawaii Judicial Selection Commission; which, along with four individual members, are defendants in this case;

3. In addition to possessing information of evidentiary value, if judge Chang maintains a career option of seeking another appointment to the Hawaii State Bench, he will again be subject to the whims of defendant commission and the insurance company employees or agents who have infiltrated it (unless of course, Plaintiff prevails.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, May 8, 2006.

"s/Stephen M. Shaw"

STEPHEN M. SHAW
Attorney for Plaintiff
EMERSON M.F. JOU, M.D.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
JUL 24 2006
at 3 o'clock
SUE BEITIA, CLERK

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EMERSON M.F. JOU, M.D.,	) CIVIL NO.
	) **06-00151**
Plaintiff,	) SOM/KSC
vs.	)
	) **FIRST AMENDED**
	) **COMPLAINT**
HAWAII JUDICIAL SELECTION	) JURY DEMAND;
COMMISSION, MELVIN I. CHIBA,	) **EXHIBIT A;**
Chairperson, ROSEMARY T. FAZIO,	) SUMMONS
Vice Chair; LOIS M. SUZAWA,	) [Civil Rights]
Secretary, And SYDNEY K. AYABE,	)
Member; State of Hawaii, DOES 1-25;	)
	)
Defendants.	)
	)

FIRST AMENDED COMPLAINT

[Page1 of the original document]

FIRST AMENDED COMPLAINT

Plaintiff EMERSON M.F. JOU, M.D., for a claim for prospective injunctive relief or prospective declaratory relief against Defendants above named, alleges. **New matters are in bold. Highlighted matters are deleted or moved elsewhere in the complaint.**

End [Page1 of the original document]

* * * * * * * * * *

[Pages 3 - 14 of the original document]

ALLEGATIONS INCORPORATED INTO EACH COUNT

8. The Hawaii Judicial Selection Commission (HJSC) was established by a 1978 state constitutional amendment. There are nine officials serving staggered terms no longer than six years. These officials are political appointees. They are not selected for their expertise on the qualities of the best and brightest judges. For example, the Chief Justice of the Hawaii Supreme Court appointed defendant LOIS SUZAWA to the HJSC. Ms. SUZAWA is a vice president of Island Insurance Company. Her term began on April 2, 2001. Article VI §4 of the Hawaii constitution provides:

"The governor shall appoint two members to the commission. No more than one of the two members shall be a licensed attorney. The president of the senate and the speaker of the house of representatives shall each respectively appoint two members to the commission. The chief justice of the supreme court shall appoint one member to the commission. Members in good standing of the bar of the State shall elect two of their number of the commission in an election conducted by the supreme court or its delegate. No more than four members of the commission shall be licensed attorneys. At all times, at least one member of the commission shall be a resident of a county other than the city and County of Honolulu.

The commission shall be selected and shall operate in a wholly non-partisan manner..."

9. From its inception in 1978, the HJSC has amassed, under color of state law, records of its proceedings, business and communications between commissioners and judicial applicants, and others having knowledge about the applicants for judicial appointment and reappointment. By rule, these records are confidential and accessible only by commission members. Secrecy of HJSC, particularly of these records has a biasing influence, on all judges.

10. The nine officials of the HJSC only need a quorum of five members and they shall act by majority vote in all actions. A further biasing influence on the state judiciary is that a judge's career can be ended by the vote of only three commissioners, when there is only quorum of five.

11. In secret proceedings, the members of the HJSC, including defendants, decide whether to retain trial judges and appellate justices when they reach the end of their terms. At least six months before the expiration of their terms, judges/justices must petition HJSC officials to renew their lucrative million-dollar compensation packages.

12. The HJSC is the exclusive state agency for the reappointment of sitting judges and justices. It conducts secret investigations into each incumbent's background, character, professional skills judicial abilities, and pending cases.

13. New applicants for the Hawaii State Bench are treated differently than sitting judges who earn retention exclusively from HJSC officials, or their successors. Here, as in the past, HJSC officials are paid by Island Insurance, AIG, State Farm, HMSA and other frequent state court litigants. A quorum of five, and a majority vote is all that is needed for defendants AYABE (AIG, Hartford (Pacific Ins. Co)), SUZAWA (Island Insurance Co) and FAZIO (HMSA) to come up with a "short list". This list of new applicants is created by rejecting other applicants for state judgeship by HSJC officials voting on the matter. The short list is then sent to the governor who then appoints judges and justices from the short list. The chief justice also receives a short list to select judges for the limited jurisdiction courts (district courts). One of these recent appointments was Fireman's Fund's house counsel.

14. The biasing influence by the HJSC precedes the terms of defendants. The scheme, under color of law, is to "pack" the HJSC with litigants with active cases, to influence the judges. The section below

shows how litigants, particularly insurers, biased the state judges:

A. Prior to the current members' terms, an individual with fiduciary duties of undivided loyalty to Hawaii Insurance Group (HIG), State Farm Fire & Casualty Company was appointed to vote for retention of judges in the courts where those companies had cases pending. That member was James Kawashima. His term was (4-2-97 to 4-1-03). Mr. Kawashima's former law partner was the Honorable Kevin S.C. Chang, the magistrate assigned to this case. Judge Chang served on the state court bench after working for Kawashima's firm, where he decided numerous insurance cases.

B. Prior to the current members' terms, another individual with fiduciary duties of undivided loyalty to Bank of Hawaii, a frequent litigant in the state courts, was appointed to vote for retention of judges in the courts where the bank's cases were pending. That member was B. Martin Luna, Carlsmith Ball et al. His term was 4-2-93 to 4-1-99.

C. Prior to the current members' terms, another individual, who was employed by GTE Hawaii Telephone, a frequent litigant in the state courts, was appointed to vote for the retention of judges in the courts where GTE had cases pending. That HJSC member was Christine Camacho. Her term was 4-2-95 to 4-1-01.

15. There is a credible threat of bias by any state judge in favor of defendants and their employers.

The corrupt practice of litigants hiring and rehiring state judges under color of state law began before defendants took office. This is a usage enforced by defendants AYABE, FAZIO and SUZAWA, and has a biasing influence on any state judge assigned to these defendants cases. Defendants have refused to cease and desist from the practice, which they contend is legal and necessary.

16. The foregoing habit or custom of defendants, and the quarter of a century practice under color of state law, is also exemplified by the appointment of former HJSC member Gary Rodriquez. His term proceeded the terms of members now on the HJSC. Rodriquez, who was appointed by the state senate president, hired/rehired judges beginning 4-2-96. Like former and current HJSC members, Rodriquez was keen on insurance.

17. The month before HJSC member Rodriquez took up the secret and heady duties of hiring and firing state judges (for their million-dollar terms) he arranged one of a series of payments from an insurance company resulting in a 43 count federal indictment for money laundering.

18. About two years after his appointment to the HJSC, Rodriquez redirected the skimmed money to a new entity. Meanwhile, Rodriquez had access to the highly secret files of the HJSC. It is not known, without court approved discovery, whether Rodriquez ever helped make up a minimum quorum of 5, or was the swing vote favoring an "insurer friendly" judicial applicant.

19. Based on the foregoing as well as Exhibit A, infra, there is thus a real, credible, and immediate threat of repeated injury by defendants' entrenched past practice of authorizing insurance company litigants with active cases pending in Hawaii's state courts to both decide, through paid representative, 6 or 10 year reappointments of judges and justices in those courts, and to litigate in those courts.

20. Past use of litigant/commissioners are evidence of habit and custom bearing on the real and immediate threat of repeated injury under color of state law, and the inadequacy of the remedies at law available to Plaintiff and others so situated.

21. The foregoing past wrongs evidence a real, credible, and immediate threat of the biasing influence on state judges whenever a would be litigant must file a cause of action against parties who pay HJSC commissioners. No judge can predict with confidence that at the end of defendant AYABE's term that AIG, Island Insurance will not be paying another commissioner. See discussion re Mr. Kawashima above.

22. The challenged actions of officials SYDNEY AYABE, ROSEMARY FAZIO and LOIS SUZAWA are the same applications of hidebound policies and usages under color of state law as those used by their predecessors.

23. Like their predecessors, Defendants SYDNEY AYABE, ROSEMARY FAZIO and LOIS SUZAWA; and perhaps other members of the HJSC at the time this suit was filed, wear two hats. First they can easily make a quorum of five (5) and vote to make up a "short list" of candidates for new judicial positions;

or, they cast the votes to rehire sitting judges for 6 or 10 year terms. The other "hat" is that these state officials and their successors are paid by, and/or have fiduciary duties of undivided loyalty to corporate litigants with numerous cases pending in the state's trial and appellate courts.

[redacted] As such, these defendants are unfit to serve on the commission and must be enjoined, because their participation on the HJSC chills or deters Plaintiff's rights of petition and advocacy and impacts other fundamental rights as alleged. Under color of state law violates rights secured by the constitution or laws of the United States.

24. There is no case pending between the parties hereto. Plaintiff is a member of a class of persons affected by the illegal acts of defendants in that [redacted] **at the time this suit was filed he was ready willing and able to file causes of action** in the courts of the State of Hawaii against the employers or clients of defendants AYABE, FAZIO, and SUZAWA, **and their successors.**

25. Clients and employers of defendants AYABE, FAZIO, and SUZAWA, **and their successors,** to whom these [redacted] **commissioners** owe an undivided fiduciary of loyalty, have, at various times, refused to pay Plaintiff, and other health providers. As a result, health providers, including Plaintiff, [redacted]

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[redacted] **are being injured every day that they cannot file their cases of action in Hawaii State courts.** This injury, [redacted] is both real and immediate in that Plaintiff must petition the state courts before the running of statutes of limitations, and advocate for payment. Plaintiff must advocate for payment from insurance companies. He must advocate before judges who defendants **or their successors** (with an undivided loyalty to insurance companies), will consider for additional career terms of ten years. Plaintiff is thereby **injured because he has been** chilled and deterred **by defendants biasing influence** from further petitioning the Hawaii state courts for redress. Others not before the court are similarly deterred from filing suit; and defendants' conduct [redacted] **is causing injury to these individuals as well in violation of rights secured by the constitution or laws of the United States.**

26. The foregoing past wrongs, standing alone, amount to credible threats that should anyone sue the insurers who pay defendants officials' salaries that any judge assigned to the case will have a pecuniary interest in his/her income which is derived from defendants and their likely successors.

27. The credible threat that the biasing influence pervades the entire population of state judges regardless of retention dates is supported by state judge Dannenberg's reported admissions, and, standing alone amount to a credible immediate threat that should anyone sue the insurers who pay defendants' salaries that any judge assigned to the case will have a pecuniary interest in his/her income which is derived from defendants and their likely successors. Judge

Dannenberg said: "I'm telling you that the judges I speak to are very nervous about this system ... It takes a very good judge to decide, I'm not going to be swayed by this."

28. Additional past wrongs to Plaintiff, stemming from the biasing influence by defendant officials and their successors on state judges, evidence a real, credible and imminent threat that, should plaintiff or others so situated sue the insurers who pay defendant officials or their successors, state judges will have a pecuniary interest in those insurer-litigants, violating the First, Fifth and Fourteenth Amdt US CONST.

29. In addition to **the imminent credible threat of** injury in fact from the immediate danger of the running of statutes of limitations against claims which Plaintiff is chilled or restrained from filing against clients or employers of defendants AYABE, FAZIO and SUZAWA, Plaintiff has already suffered injury in fact from judges influenced by defendants and other members of the JSC. The following are recent examples of [redacted] **the biasing** influence of self-insured, or insurer-clients of JSC members, on state circuit judges.

A. Over objection, circuit judge Karen N. Blondin assigned **several cases including** an insurer bad faith (and other relief) lawsuit to state circuit judge Gary W.B. Chang. One of the defendants was the City and County of Honolulu, ("C&C"), judge Chang's former client, C&C, was represented by current Judicial Selection Commission ("JSC") member Ralph La Fountaine, and his law firm. La Fountaine will be joined in this complaint if discovery points to his fiduciary relationship or financial interest in any litigant in pending

cases. Judge Chang must petition the JSC six months before his term ends on May 31, 2009. At stake, is over a million dollars in salary for the judge. Without disclosing his prior representation of C&C, judge Chang signed an order for C&C submitted by C&C (La Fountaine's firm) ex parte and afterwards gave C&C a dismissal against Plaintiff.

Judge Chang also expanded a loser pays statute for assumpsit claims to the torts of insurer bad faith and interference with the physician patient relationship, in favor of insurers/self-insureds.

B. Another circuit judge, the Honorable Sabrina McKenna, was asked to disqualify herself in an insurance case Dr. Jou had filed against Island Insurance company. The motion to disqualify was filed because Judge McKenna's time to petition the JSC for her $1 million-plus-contract was months away; and defendant SUZAWA, an executive whose undivided fiduciary duty of loyalty was to Island Insurance, would be on the JSC at the time of judge McKenna's petition. Island Insurance was also represented by current, JSC member, Ralph LaFountaine's law firm. After refusing to disqualify herself, judge McKenna ruled against Dr. Jou, and in favor of Island, on the merits.

C. In a case strongly affecting the confidentiality of Plaintiff's clinic records when dealing with defendant FAZIO's client HMSA, the following occurred. Compare this timeline, with **Honolulu District Court** Judge Dannenberg's quoted statement **at Exhibit A,** [redacted] **from the *Honolulu Star Bulletin* May 5, 2004 "said he knows collogues who delayed issuing controversial decisions for months until after their retentions were approved. In one case the delay was**

more than a year, Dannenberg said. He declined to provide names of the collogues involved. 'I'm teling you the judges I speak to are very nervous about this system' ". The same supports Dr. Jou's injury in fact from forebearance from further **advocacy (expression)** [redacted] and petition in state courts, against defendant FAZIO's client, HMSA.

> Wang v. HMSA, HI S.Ct. 22612 LEXIS 116 (3-5-04), cert den. 124, S.Ct. 819, 2004 U.S. LEXIS 8702 an insurer bad faith/medical privacy case was filed on April 4, 1996. It was dismissed on motion on September 3, 1997, by then State circuit Judge Kevin S.C. Chang. Case No: 1st Cir. 96-1379-04. While on an egregiously delayed appeal, this occurred:
>
> On or about January 22, 2003, HMSA donated $1 million in policyholder funds to the U.H. medical school.
>
> On or about February 11, 2003, Scott Serota, CEO of Blue Cross (HMSA is part of Blue Cross) flew from Chicago to Honolulu to speak to community leaders.
>
> On March 5, 2003, the Hawaii Supreme Court affirmed the dismissal of Dr. Wang's lawsuit in a short, unpublished memo opinion, with a lengthy dissent, **urging publication,** by Justice Acoba.
>
> **On March 31, 2003 The Honorable Ronald T.Y. Moon began his new term as Chief Justice of The Hawaii Supreme Court.**

On April 2, 2003 defendant Rosemary Fazio, whose firm is counsel to HMSA's 27 member board, and to HMSA, started her term of six years as a state official on the HJSC. Obviously, her application was submitted well ahead of the supreme court's favorable decision of 3-5-03.

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41. The specific conduct by defendants proximately causing injuries to Plaintiff traceable to these defendants consists of the pecuniary interest state judges or justices have in the insurers who pay defendants, as opposed to the class of would-be litigants who do not pay defendants and who enjoy no similar fiduciary duty of loyalty from these defendants.

42. Plaintiff and others so situated have barriers of access to state trial and appellate courts directly traceable to defendants' official voting positions on the nine-member judicial selection commission, in that they are left with an untenable Hobson's choice of giving up on their valued causes of action; or, filing suit on these federally protected causes of action in courts where Plaintiff and others will face judges having a

pecuniary interest in the outcome. This interest is direct in that these few litigants hold the keys to the judges' careers. These insurers pay defendants, and enjoy their fiduciary relationship of undivided loyalty.

43. 216 The disputed violations of the **Constitution and Laws of the United States under color of law** Petition Clause and Free Expression Clause of the First Amendment have directly **and proximately** caused actual injury, damage, or injury in fact in that statutes of limitations are running against insurance claims for unpaid benefits owed to Plaintiff **and others so situated** by insurance companies who pay defendants. The **chilling effect injury** caused by litigant-paid defendants' concurrent power to hire and fire state judges is forcing Dr. Jou **and others so situated** to forgo filing lawsuits **for damages from withheld** to collect his fees, interest, and expenses. This specific future harm is not merely threatened, but it is occurring daily (until **this Court renders declaratory judgment or** defendants are enjoined), as the statutes of limitations are running. By example, and not by limitation, listed below are a few of the many federally recognized property rights in causes of action, which will be forever lost unless this Court grants prospective relief.

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